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Supreme Court of the United States.

OCTOBER TERM, 1903. No. 277.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER AND DANIEL LAMONT,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellees.

Brief for the appellants, THE NORTHERN SECURITIES COMPANY (herein styled the Securities Co.), JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY and GEORGE F. BAKER.

[*Note*—The Roman numerals indicate the volumes, and the Arabic the pages, of the Record.]

This is a suit in equity, brought by the United States, under the Act of Congress, of July 2, 1890, known as the Anti-Trust Act, or Sherman Act.

The Petition.

The petition charges that the defendant J. Pierpont Morgan and others, styled his associates, and the defendant James J. Hill, and others, styled his associates, owning or controlling a majority of the stock of the two defendant railway companies, (which will in this brief be called the Great Northern Co. and the Northern Pacific Co., respectively), combined and conspired together on November 13, 1901, to effect a "virtual consolidation" of the two railway companies, and to monopolize and restrain their competitive interstate and foreign commerce "through the instrumentality and means following" (*and no others*), viz., by forming the Northern Securities Co., a corporation under the laws of New Jersey, and transferring to it the stock (being a majority or controlling interest) held by them in the two railway companies. That such transfer would give the Securities Co. the monopoly complained of, because effecting a "virtual consolidation" of the two railway companies and their systems, and a "practical pooling" of their earnings in the hands of the Securities Co., (since that company would receive from each railway company the dividends payable on the shares of such company held by it), and would vest in the Securities Co. the selection of the directors and officers of both railway companies, "with not only the power, but the *duty*" (i. e. on the part of such directors and officers) "to pursue a policy which would promote, *not* the interests of one sys-

tem at the expense of the other, but of both at the expense of the public."

It is suggested rather than alleged that the conspirators had been brooding over their conspiracy ever since 1896, when a contract involving (as this Court held) the acquisition of Northern Pacific stock by the Great Northern Co., and not by its stockholders, was held, in Pearsall v. Great Northern Ry. Co., 161 U. S. 646, to violate a statute of Minnesota.

And the petition also charges that a purchase of substantially all the shares of the Chicago, Burlington & Quincy Rd. Co., made by the Great Northern Co. and Northern Pacific Co. in April, 1901, at a cost of over $200,000,000, was merely a step toward placing the shares of the two last-named companies under a common source of control.

The petition charges that the conspiracy was carried out, and that the Securities Co. acquired the shares of the conspirators and also additional shares in both railway companies, so that it now (i. e. at the beginning of this suit) holds "as owner and proprietor" substantially all the capital stock of the Northern Pacific Co., and a controlling interest if not a majority of that of the Great Northern Co., and that the "virtual consolidation," monopolizing, suppression of competition, etc., which were the objects of the conspiracy, have been fully effected.

It is charged in the petition that the Securities Co. "was not organized in good faith to purchase and pay for the stocks of" the two railway companies, and that it never had money enough to do so; and that the only consideration for the transfer to it of

the shares of the two railway companies was the issue and delivery of its own shares in exchange therefor.

The petition, in paragraph VI, says that the purpose of the conspirators was that the Securities Co. should become the *absolute owner* of the shares transferred to it, and the interest of the transferrors "was to terminate" and they "were to be eliminated." In paragraph VII, it is said that the Securities Co. is now holding all such shares "as owner and proprietor." But in paragraph XI it is alleged, with equal positiveness, that the Securities Co. "is a mere depository, custodian, holder and trustee" of the same shares. Of course the earlier statements prevail against the pleader, especially as the Securities Co. could not at the same time fill all the positions assigned to it in paragraph XI in respect to *all* the shares held by it.

The relief demanded (*inter alia*) is that each railway company be enjoined from permitting the Securities Co. to vote or receive dividends on the shares of such company held by it; that the Securities Co. be enjoined from voting or receiving dividends on such stock; and that the Securities Co. be compelled to recall and cancel all certificates of stock issued by it in purchase of or exchange for the shares of either railway company, and to surrender in return therefor the certificates of the railway shares in lieu of which they were issued.

(It will be observed that the claim of the government is that the Securities Co. has no right to retain its holding of shares in even *one* of the two railway companies).

THE ANSWER.

The answer puts in issue every one of the foregoing statements of the petition, except the actual formation of the Securities Co. and its purchase of shares of the two railway companies, in exchange for its own shares.

It says (Par. II.) that at and before the date of organization of that company, the Great Northern stockholders numbered 1800 and the Northern Pacific stockholders 3500. And that the persons named in the petition as owning or controlling a majority of the Great Northern stock, never owned or controlled as much as one-third of that stock. And the persons named as owning or controlling a majority of Northern Pacific stock never owned or controlled as much as one-third of that stock.

It denies (Par. VI.) the making of the combination or conspiracy charged in paragraph VI of the petition, and denies all the purposes therein imputed to the organizers of the Securities Co.

It denies (Par. VIII.) that any change has taken place in the directorate or management of either railway company since the organization of the Securities Co., or that any of the things done by any of the defendants, their promoters, directors, officers, or stockholders, were done in pursuance of the pretended conspiracy alleged in the petition, and denies that any virtual or other consolidation of the railway companies or their business has been effected or attempted, and denies any conspiracy or intention to restrain trade or commerce, etc.

It says (Par. XI.) that in every one of its acquisitions of shares of either railway company, the Securities Co. has dealt solely with the owner of such shares individually and separately, and that the transfers to it have been absolute and without reserve. Besides payments made by it in its own stock, the Securities Co. has expended upwards of $40,000,000 in cash, in the purchase of the shares held by it. Those shares it holds, and, so long as they remain its property, it will continue to hold, in its own right free from any agreement or understanding that in any manner restricts its right and power of immediate sale, or its right to make any use of them that other owners of such stocks might make.

In the second half of the answer, is stated in detail (in Par. I.) the origin and progress of an enterprise of the two defendant railway companies to build up a great interstate and oriental commerce; the necessity of the fullest access to the territory traversed by the Burlington lines as a market for their east-bound and a source of supply of west-bound traffic; the purchase of the Burlington shares to supply that need, and for no other purpose, and with no purpose to lessen competition of the defendant railways with the Burlington lines or with each other.

In Par. II, the answer states the origin and history of the project of an investment company, which finally developed into the Securities Co.; states the attempt of persons hostile to the development of the enterprise and the business of the defendant railway companies to obtain control of the Northern Pacific

Co.; that such attempt was narrowly defeated and might at any time be renewed, and, if successful, would destroy the interstate and oriental commerce the companies were building up, and would defeat the purposes for which the Burlington shares had been bought; and that as a necessary means of protecting and defending the interstate and foreign commerce of the two railway companies, including their competitive commerce here in question, and the interest of their stockholders therein, the Securities Co. was formed. There has been no agreement among the stockholders of the Securities Co., (who are more than 1300 in number) or between them and any person or corporation as to how they should use or vote their stock. The persons concerned in the formation of the Securities Co. have never held, owned, or controlled an amount of its stock equal to so much as one-third of the amount of it now outstanding.

The Securities Co. was not formed as a scheme or device to evade the Anti-trust Act, and none of those who formed it or sold their shares of stock to it, had any purpose to restrain commerce or lessen competition or monopolize traffic. Since its formation rates on both lines have been voluntarily reduced so as to decrease their annual net earnings by upwards of $1,000,000. The competitive interstate traffic of the two railways, for which the two railway companies have power to fix rates independently of the action of other carriers, does not exceed three per cent of their total interstate traffic. (Par. III.)

The sale and transfer of property, whether in the

form of corporate stock or otherwise, is not in violation of the Anti-trust Act. The Securities Co. is not a railway company, has no power to operate railways, or control rates, or monopolize or restrain traffic of any kind.

The Securities Co. was not organized for the purpose of acquiring a majority of the stock of either railway company, but merely to purchase the stock of those who wished to sell. The transactions complained of have consisted in the organization of a lawful corporation and the purchase of property by it, have been expressly authorized by law, and have had no effect whatever to restrain interstate or foreign commerce. If they should hereafter have any such effect (which is denied) that effect will be merely indirect, remote, and incidental and collateral and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and, it is believed, is destined to result from the enterprise of the two railway companies which culminated in the purchase of the Burlington stock.

The Anti-trust Act was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce, merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce trifling both as respects territory and volume.

Nor was the act intended to limit the powers of the several states to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock. Such

a construction would make it unconstitutional (1) because the power to regulate commerce among the States does not include the power to regulate matters above mentioned in reference to State corporations; and, (2) because it is depriving persons of their property without due process of law to take from them the right to sell it as their interest may suggest.

The answer also pleads a defect of necessary parties defendant. The persons who sold railway stock to the Securities Co. were 1300 or more in number, only a few of whom had any connection with the planning or forming of the Securities Co., and, in their absence from this litigation, no decree can be made affecting their rights.

The Decision.

The cause was heard before the four Circuit Judges of the Eighth Circuit in accordance with the Act of Congress for expediting causes of this nature.

The decision was for the government, and was based on the following findings of fact:

1. That certain large and influential stockholders of the two defendant railway companies, "who have been made parties defendant to the present bill," having "practical control of the two roads," and "acting in concert with each other, conceived the design of placing a very large majority of the stock of *both* of the last named companies in the hands of a *single owner.*"

[The errors in this statement are the subject of the first assignment of error].

2. To this end these stockholders arranged and agreed with each other to cause the formation of a New Jersey corporation which, when organized, "should buy *all* or at least *the greater part* of the stock of the Northern Pacific and Great Northern companies."

[The error in this statement is the subject of the second assignment of error.]

3. "The individuals who conceived and promoted this plan" (i. e. the individual defendants), "agreed with each other to exchange their respective holdings of stock in the railroad companies for the stock of the New Jersey company when the same should be fully organized, and to use their influence to induce other stockholders to do likewise, to the end that the New Jersey company might become the sole owner of the whole or at least a major portion of the stock of both railroad companies."

[The error in this finding is the subject of the third and fourth assignments of error].

4. "In accordance with this plan the Securities Co. was organized on November 13, 1901, under the laws of New Jersey, with a capital stock of $400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor."

[The error in this finding is the subject of the fifth assignment of error].

5. "When the Securities Co. was organized it assented to and became a party to the scheme which had

been devised by its promoters before it became a legal entity."

[The error in this finding is the subject of the sixth assignment of error].

6. Very shortly after its organization the Securities Co. acquired a large majority of all the stock of the Northern Pacific Co. at the rate of $115 per share, paying therefor in its own stock at par.

7. At the same time it acquired about 300,000 shares of the Great Northern Co. from its promoters, at $180 per share, paying in its own stock at par.

8. The Securities Co. subsequently made further purchases of Great Northern stock at the same price, until in about three months, it had acquired about $95,000,000 (of the total $125,000,000) stock of that company, using $171,000,000 of its own stock in payment.

"The Securities Company was enabled to make the subsequent purchases of stock from stockholders of the Great Northern Co. not immediately concerned in the organization of the Securities Co., by the advice, procurement and persuasion of those stockholders of the Great Northern Co. who had been instrumental in organizing the Securities Co. and had exchanged their own stock for the stock of that company shortly after its organization"—that is these individual defendants.

[The error in this finding is the subject of the seventh assignment of error].

9. At the date of the decision "the Securities Co. is the owner of about 96 per cent of all the stock of the Northern Pacific Co., and the owner of about 76 per cent of all the stock of the Great Northern Co."

10. "The scheme which was thus devised and consummated led inevitably to the following results:

"(1) It placed the control of the two roads in the hands of a single person, to-wit: the Securities Co., by virtue of its ownership of a large majority of the stock of both companies.

"(2) It destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies.

"And, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done wilfully and deliberately, we must conclude that those who conceived and executed the plan aforesaid intended, among other things, to accomplish these objects."

[The error in this finding is the subject of the eighth assignment of error].

To the facts thus stated by it the court applies the following legal propositions:

1. All contracts or combinations which merely tend to restrain interstate commerce or merely confer the power to restrain such commerce, whether by suppression of competition or otherwise, are, in themselves, and although such tendency is never realized

nor such power exercised, or intended to be exercised, violations of the Anti-trust Act—and this though the commerce is that of railway companies operating under state charters.

[These rulings form the subject of the 9th, 10th and 11th assignments of error].

2. The individual defendants would have violated the Anti-trust Act if, in pursuance of a previous understanding or agreement so to do, they "had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon and pro rate or divide them among all shareholders of the two companies who had transferred their stock. The result would have been a combination in direct restraint of interstate commerce because it would have placed in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers whose lines are practically parallel."

[The court in the foregoing paragraph (which forms the subject of the 12th assignment of error) is assuming a case very different from the present one. Here the Securities Co. is absolute owner of its shares. Its power over the shares and their income, and its power to suppress competition (so far as it may possess any such power), are alike incidents of

its ownership—its absolute ownership—of the stock. They rest on that ownership alone, and are not conferred on it by any agreement.

But in the case supposed by the Court, the transferree is not absolute owner. He is a mere nominal holder of the stock. The transferrors "empower" him to receive all dividends on it, and pro rate or divide them among all the transferrors. The transferree derives his power (if any) to suppress competition from his transferrors, and does not possess it as an incident of absolute ownership of the stock. He is not such absolute owner, and the case imagined by the Court is what is commonly called a "Trust," and is entirely different from that of the Securities Co., and no inference can be drawn from the former to the latter.]

3. Though each railroad company has its own board of directors, still they do not operate independently, but are controlled by those who own the majority of the stock.

The case of *Pullman Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 596, was a case of private contract, and the decision that the directors and not the stockholders control the corporation,

"Cannot be held applicable to cases arising under the Anti-trust Act, where the point involved is whether the ownership of all the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed we regard suppression of competition, and to that

extent a restraint of commerce, as the natural and inevitable result of such ownership."

[In this paragraph (which forms the subject of the 13th and 14th assignments of error) the Northern Securities Co. appears as owner of the stock, and the power to suppress competition as an incident of such ownership, and its suppression as the result of such ownership not as the exercise of a power to suppress conferred on it by others.

The Court seems to have overlooked the wide difference between a suppression of competition which is incident to ownership of property (as when one of two competing tradesmen buys out the other) and a suppression effected by means of a contract, as when two competing tradesmen agree not to sell below a named price].

4. "By what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter."

[That is, a consolidation of two railway companies doing an interstate business, though expressly authorized by the state or states of their creation, suppresses competition and so restrains interstate commerce and violates the Anti-trust law and is illegal, and the charter provisions authorizing it are of

course unconstitutional, the consolidation of corporations doing an interstate business being a matter of interstate commerce which congress alone can regulate. And this although the suppression of competition is simply an incident of the ownership by one company of what formerly belonged to two, such single ownership being the result of the consolidation. The foregoing is the subject of the 16th and 17th assignments of error].

5. The Court, having thus shown that as the promoters of the Securities Co. could not lawfully transfer a majority of shares of the two railroad companies to one or a few persons giving them power to operate the roads in harmony and stifle competition, concludes that "it is manifest therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law," and gives to the promoters of the Securities Co. credit for the astute idea that what they could not lawfully do themselves could lawfully be done for them by a corporation created for the purpose—and this even though the Anti-trust act declares that the word person shall include corporation. The foregoing forms the subject of the 18th and 19th assignments of error.

[It is needless to say that we claim no power for the Securities Co. that could not be held and exercised by an individual or partnership. If they could not lawfully buy and hold these stocks, the Securities Co. cannot. If they could lawfully do so then the Securities Co. can, and it can buy and hold the stocks

precisely because an individual or firm might do so].

The court assumes that the shares held by the Securities Co. have merely been "placed in its name," and that it is not the owner thereof.

[This error is the subject of the 20th assignment of error].

The court holds that the New Jersey charter presents a question for the court to decide "whether a charter granted by a state can be used to defeat the will of the National Legislature," etc.

[This passage forms the subject of the 21st assignment of error].

6. Answering the objection that any restraint of commerce exercised by the Securities Co. is merely indirect, the court says:

"It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do."

[This forms the subject of the 22nd assignment of error].

The court cites and distinguishes the various cases under the Anti-trust Act in this court, and fails to find in them "any suggestion that a combination such

as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce."

[The foregoing forms the subject of the 23rd assignment of error].

7. After disposing of the point that the Anti-trust law, if applied to this case, is invalid as depriving citizens of liberty of contract (its conclusion forming the subject of the 24th assignment of error), and overruling the point that the Anti-trust Act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad chartered by the several states (see the 25th assignment of error), the court takes up the contention that the conspiracy charged in the bill had done its work and come to an end before suit brought, and so there is nothing to restrain or prevent; and the act gives the court no jurisdiction to undo what has been done.

It meets this by repeating the statement that "the Securities Co. made itself a party to a combination in restraint of commerce that antedated its organization, as soon as it came into existence, doing so of course, under the direction of the very individuals who promoted it."

[This forms the subject of the 26th assignment of

error. The bill nowhere alleges any such addition to the "combination," nor is there a scintilla of evidence of it. The bill charges that the combination or conspiracy was formed to organize the Securities Co. and transfer to it a majority of the shares of the two railway companies, and that this has all been done. And even if the Securities Co. joined the combination as soon as born, the conspiracy was equally at an end, for there is no pretense that its terms were changed on the accession of the Securities Co.]

8. A point considered important was made by the defendants, as it will be made on this appeal, to the effect that even though the formation and stock purchases of the Securities Co., taken by themselves, might operate to restrain commerce, yet, taking the transaction as a whole of which these matters formed a part, the whole transaction so far from restraining even the three per cent competitive traffic of the railways, was necessary to protect and did and does in fact protect the interstate commerce of both roads, and operates to preserve and enlarge that commerce and not to restrain it.

The Court, however, regards this as merely an argument that an admitted restraint of trade is beneficial to the public and hence not unlawful, and disallows it.

[This ruling forms the subject of the 27th and 28th assignments of error].

THE DECREE.

The Court accordingly prepared and entered a decree—

1. Adjudging that the stock of the two railway companies now claimed to be held and owned by the Securities Co. was acquired and is now held in virtue of a combination or conspiracy theretofore entered into by the defendants in restraint of trade and commerce among the several states such as the Anti-trust Act denounces as illegal.

[This forms the subject of the 29th and 30th assignments of error].

2. Enjoining the Securities Co., its officers, etc.

(a) From acquiring or attempting to acquire any more of such stock.

(b) From voting any such stock at any meeting of stockholders of either railway company.

(c) From exercising or attempting to exercise any control, direction, supervision, or influence on the acts of either railway company by virtue of its holding of stock therein.

[The foregoing forms the subject of the 31st and 33rd assignments of error).

3. Enjoining each railway company, its officers, etc.

(a) From allowing the Securities Co. or its attorneys or agents to vote the stock held by it.

(b) From paying any dividends on such stock to the Securities Co.

(c) From permitting the Securities Co., or its officers, etc., to exercise any control over the corporate acts of such railway companies.

[The foregoing is the subject of the 32nd assignment of error].

The decree further provides that it shall not be construed as preventing a re-exchange between the Securities Co. and those to whom it has issued its own shares in exchange for those of either railway company.

By order of Judge Sanborn, the injunction against payment of dividends was suspended pending this appeal.

STATEMENT OF THE FACTS.

The court refused altogether to consider the position of defendants (or the evidence sustaining it) that the formation of the Securities Co. and its stock purchases, were not to gain control of the two railroad companies, but were made (as stated in the answer) to defend, and were necessary to defend, from destruction an enterprise of the defendant railway companies for the creation and development of a great volume of interstate and oriental commerce, and properly became part of that enterprise and must be considered in connection with that interest, to determine their character as restraints of commerce or otherwise.

It therefore becomes necessary to set forth at some length both the evidence as well as the facts on this branch of the case, as well as on those points immediately connected with the formation of the Securities Co. as to which the Court has fallen into serious errors of fact and of law.

(1) The Enterprise of Creating a Great Oriental as well as Interstate Commerce.

(2) Methods adopted. Progress of the Enterprise down to the purchase of the Burlington Shares.

(3) Effect of want of Permanent Connection with Markets and Sources of Traffic in this Country.

(1) Mr. Hill, I, 665-670; 680-683.
(2) Mr. Hill, I, 668-670; 681-2.
(3) Mr. Hill, I, 680-1, 694, 695.
(4) Mr. Hill, I, 677-9; 731-2; 733-5; 738-9.
Mr. Weyerhaeuser, I, 746-7.
Mr. Harris, I, 753, 766-7, 771.
Mr. Saunders, I, 870.

(1) The Great Northern Co. was chartered by Minnesota, the Northern Pacific Co. by Wisconsin. Each has eastern termini at St. Paul and at Lake Superior, and its western terminus at Puget Sound. They are to a certain extent competing lines for interstate traffic. The main line of the Great Northern Co. was mostly built by the St. Paul, Minneapolis & Manitoba Co., a corporation organized by Mr. Hill and others in 1879, and of which he was president until, in February, 1890, all the lines of the Manitoba Co., constructed and to be constructed, were leased for 999 years to the Great Northern Co., of which company he became and has ever since been president. The policy of these companies of which he was president has largely if not entirely been on the lines recommended by Mr. Hill, not because of any stock control, for he and his immediate associates never held more than 30 per cent of the stock (I, 698), but because of the confidence which the remarkable ability and success of his policy and management inspired in *all* the shareholders.

In 1887, the line of the Manitoba Co. had been completed to Helena, Montana. In 1889, that company began an extension of its line to Puget Sound, which was opened for travel in 1893.

Before beginning this extension the company thoroughly investigated the resources of the country that the railway would traverse, and the kind and quantity of traffic it would be likely to obtain. The country was sparsely populated and could furnish little freight except its natural products, such as lumber and minerals, etc.

Whatever commodities the region might furnish for carriage would be raw material of great weight and bulk in proportion to its value, which would not bear transportation to a market except at extremely low mileage rates, such as could be made possible only by a great volume of traffic in both directions and every practicable reduction in the cost of transportation.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for which is in the prairie States between the Mississippi River and the Rocky Mountains; but the lumber and shingles from the Pacific Coast would not bear the cost of transportation to those states if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. "Any rate that would pay the cost of moving a car from the eastern terminal to the coast empty, to bring eastward a carload of lumber, would be prohibitory." (Mr. Hill, I, 667). And the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars—at least when the lumber traffic should have grown to any magnitude; the result being that unless the company could secure traffic for carriage beyond the Pacific Coast no great commerce either way could exist or be created.

(2) To meet the conditions under which it must create the traffic necessary to its own successful operation, the company went to great additional expense in the location and construction of its road to obtain gradients lower than those of any ine to the Pacific Coast. It spent over $800,000.00 in explorations and surveys before any construction work was done, and Mr. Hill personally took part in these explorations, and examined the soil, water and climate of the country (I, 665). It also made strenuous efforts to create an eastern demand for the lumber of the coast—to create a market for it which did not before exist, in territory where there was little knowledge of it, for the rate on lumber eastward had been 90 cents per hundred, which was prohibitory. To stimulate eastern shipments, Mr. Hill met the representative lumber manufacturers. They thought a rate of 65 cents would enable them to ship their lumber East. Mr. Hill thought otherwise and that they could not pay over 50 cents. And so the company made a rate of 40 cents, and thus began a traffic, which though still in its infancy "has been very largely developed." (Mr. Hill, I, 667).

In the first years of the operation of the road, and before the lumber trade had attained large proportions, the west-bound traffic was more than sufficient to fill the returning cars, the Alaska trade furnishing a large west-bound movement. But as the lumber traffic increased, it became apparent that the east-bound would ere long exceed the west-bound traffic, and "that carried us to investigating the different markets to which we could send any-

thing that was made in the East." (I, 669). For this purpose men were sent to China and Japan, one of them was kept there over a year. "His business was to get a manifest of every vessel that entered or left a Chinese or Japanese port as far as he could; to find what the exports and the imports of those countries consisted of and where they went." (I, 668).

How a Japanese company put on a line of steamships connecting at Seattle with the Great Northern line, and how the first shipments of rails and cotton to Japan were procured, is thus stated by Mr. Hill, (I, 669-670):

> "In 1896, in the fall, we had just closed an agreement with the Japanese General Steamship Company to put on a line of through steamers running to our terminal at Seattle, in connection with our road; and the conditions of the contract were such as to enable us to make a rate from the East to the Orient. I remember when those men were present with us. Some of them were interested in securing rails for their railways. I asked them where they were going to get their rails. Well, they thought they would either get Belgian rails or English rails. The Belgian rails would come from Antwerp, the English rails from Middlesboro. I asked them, as they were going to stay here for a day or two, to let me see what could be done for American rails. I immediately cabled to my friends in London and got quotations for Antwerp and Middlesboro rails, and the best charters to Yokohama. I remember that the rails could be laid down at about $29, the English or Belgian rails. I telegraphed to Chicago. The time was rather a quiet one in American manufactures, especially with the rail-mills, (the Joliet and one or two others were about closing down), three or four weeks before election, and possibly they were a little anxious to

keep their mill running. I told them if they would make a rate of $19.50, we would give them a rate of eight dollars a ton—of 40 cents a hundred—from Chicago to Yokohama, which would be $1.50 a ton lower than the English or Belgian quotations. After some hesitation they made the rate and got the contract for 15,000 tons. That is one case. The cotton business: Some Japanese were passing through. The men I had out there reported the amount of cotton spun in Japan and the fact that the cotton came—the raw cotton came—mainly from India; a short staple cotton, which made an inferior yarn and sold at a low price. I got these gentlemen to try a small shipment of American cotton, with the guaranty, if it did not prove profitable to mix our long staple with their short staple of India, that I would pay for the cotton. The result of that was very satisfactory. The cotton trade has grown very fast, both raw and manufactured, but especially raw cotton."

The growth of this commerce is thus stated by Mr. Hill, (I, 682):

"In 1901 the amount of cotton piece goods was 13,070 bales; 1902, 64,542 bales. Raw cotton in 1901 was 13,230,000 pounds against 41,230,000 pounds the next year."

"Outside of cotton—take nails, wire, articles of that kind—that business has grown to be of very large dimensions, but our rate is a very low one. From Lake Erie to Hong Kong it is 45 cents a hundred, $9 a ton, on those commodities. But the demand for American steel at home makes it almost a matter of indifference whether they send it or not, and we have to look not only to cotton, but to anything that will furnish us business going to the west." (I, 678).

Prior to 1900 the company became unable to get tonnage sufficient for its oriental traffic, and started

to build two ships of its own, of 28,000 tons each, the largest carrying capacity of anything afloat. When Mr. Hill was examined, these were nearly ready for launching (I, 681-2). One has since been launched and is nearly ready for sea. The object of so great tonnage was to be able to make low rates. (I, 683).

(3) In the interstate and international commerce which the Great Northern Co. has thus labored to create and extend, it competes both in this country and on the high sea with the other transcontinental lines, including the Canadian Pacific railway.

But this competition "is a small matter." (Mr. Hill, I, 736). The important competition is "with the Suez canal, * * * with anything that floats on the high seas, * * * with markets, with goods. * * * The competition extends all the way through from the production—the transportation, the cost of laying them down," at oriental ports. (I, 680). And again: "We are not competing with them," (the other transcontinental lines). "We are competing with the conditions that are made applicable through the Suez canal, and through any possible route to get it to the Orient. We have to meet whatever the conditions are or else not do it" —i. e., not carry the traffic (I, 681).

In short this competition in the Orient is a competition with the manufacturers and the commerce of the world, and the rates must be made in com-

petition with the markets of Europe and with the rates of Ocean carriers, whether by way of either Cape or by the Suez Canal.

The policy thus followed by the Great Northern Co. in building up an international, and thereby an interstate commerce, has been followed by the Northern Pacific Co. since its reorganization in 1896. In that year the lines of the Northern Pacific Rail*road* Company (chartered by Congress in 1864) were bought at a foreclosure sale by the present Northern Pacific Co., a corporation chartered some years before by the State of Wisconsin. The purchase was for the benefit of the holders of the securities of the Northern Pacific Rail*road* Co., who became entitled to shares of the purchasing company. The capital of the latter—the Northern Pacific Co., defendant in this cause—was fixed at 155 millions, divided into 80 millions of common and 75 millions of preferred stock. The latter was meant to have but a temporary existence, the company having the right to pay it off at par and cancel it on January 1st of any year until 1917. (I, 374-5, 381). In accordance with the reorganization agreement all the shares, both of preferred and common stock, were vested in and held by J. Pierpont Morgan and four others as "voting trustees," with sole power of voting thereon. This trust was to continue five years unless sooner terminated by the trustees (II, 1654). It was terminated January 1, 1901.

Prior to that date it was considered that it would be desirable to retire the preferred stock in the near future, but action was deferred in order that the

question might be acted upon by a board of directors chosen directly by the shareholders, rather than by a board chosen by the voting trust. (Mr. Steele, I, 283; Mr. Morgan, I, 323).

That the board of directors had power to retire the preferred stock and thus make the common stock the only stock of the company, and this independently of the shareholders, was an important, if not the most important, factor in the defeat of an effort by a hostile interest to acquire a stock control of the Northern Pacific Co.—an attack which will be described later, and which was the immediate cause of the formation of the Securities Co.

(4) In creating and maintaining this competitive interstate and international commerce, both the Great Northern Co. and the Northern Pacific Co. were hampered and placed at a disadvantage with European competitors by want of a sufficiently close and permanent connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their west-bound traffic must be supplied. Mere joint-tariff arrangements with connecting lines did not ensure such stability of rates or permanent conditions of any kind as were essential to secure the establishment of industrial enterprises along their lines, nor did they allow of a car-service sufficient and certain enough to meet the requirements of producers, ship-

pers and consumers. This is clearly pointed out by Mr. Hill (I, 670-1, 677-9, 738-9); Mr. Weyerhaeuser, (I, 746-7); Mr. Harris, (I, 750-1, 767-771); Mr. Saunders (I, 870-1).

As Mr. Hill says, there needed to be—

> "More than a joint tariff, which might be withdrawn at any time. We could not build up a great permanent business, extending across the continent and even across the ocean, on the basis that tomorrow the rate might be changed, or the party with whom we were working to reach the different points of production or consumption had some other interest or some greater interest elsewhere." (I, 670-1).

And that in case of mere joint tariffs with other lines, he says, on cross-examination (I, 738-9):

> "Any of those lines, or all of them, could at any moment withdraw their joint tariff from us. We could not control the business a day longer than they were willing we should, and we could not undertake to build up a great, permanent interstate and international business on any such basis. I think it would be ridiculous, the statement of it."

And he cites instances where joint rates have been refused his road by other companies.

Mr. Harris says (I, 750-1) that a joint tariff

> "May be cut off by anybody's volition from day to day, and they say, 'That door has got to be closed.' But ownership, common ownership, provides an open door and the means of access, ingress and egress, and people take advantage of it."

THE PURCHASE OF THE BURLINGTON SHARES.

(1) The Burlington Road needed for the Enterprise, and to secure a Coal supply for Minnesota and States Westward. Its Advantages as furnishing Markets, etc.

(2) The Making and Terms of the Purchase.

(3) Not made because the Burlington was a Competitor or to head off any extension of it.

(4) Not made with a view of placing Great Northern and Northern Pacific under a Common Control.

(1) Mr. Steele, I, 279.
Mr. Morgan, I, 328-337.
Mr. Hill, I, 670-1, 671-2, 673-7, 678, 733
Mr. Weyerhaeuser, I, 745, 746-7.
Mr. Harris, I, 749-754, 757-8, 771.
Mr. Saunders, I, 868-871.

(2) Mr. Hill, I, 26-31, 41-45, 148-150.
Mr. Mellen, I, 159-162.
Mr. Steele, I, 277-280.
Mr. Morgan, I, 332.

(3) Mr. Hill, I, 138; I, 686, 687.
Mr. Harris, I, 759-762.

(4) Mr. Morgan, I, 334, 344-5.
Mr. Hill, I, 686.

(1 & 2) Some years before 1901, Mr. Hill had contemplated a joint purchase by the Great Northern Co. and the Northern Pacific Co., of the Burlington road or the stock of that company, as a means

of securing the best market in the country for their east-bound shipments, the best source of supply for their west-bound interstate and foreign commerce, and the only available source for supplying fuel to the country along their lines east of the Missouri River, and for their own needs. But in the then conditions, and the Northern Pacific Co. having not yet reached a point where its shares were worth par, that company was not able to join in a purchase which it was not thought advisable for the Great Northern to undertake alone. (Mr. Hill, I, 685). But in the year 1900, the Northern Pacific Co.'s financial position had become so well established that it had been determined to dissolve the voting trust on the 1st of January, 1901, and about this time Mr. Morgan (whose firm had conducted the reorganization of the Northern Pacific Co., and had ever since been its bankers and fiscal agents) thought that the time had arrived when the two companies might join in obtaining an extension eastward, and he and Mr. Hill conferred on the matter. Mr. Morgan was principally concerned with obtaining a line to Chicago, so as to make that city the terminus; and considered that, of the available lines, the St. Paul was preferable, because, if purchasable at all, it could be bought cheaper than the Burlington. The latter was Mr. Hill's choice, his views embracing much more than a mere eastern terminus; but he yielded to Mr. Morgan's wish, and a negotiation for purchase of the St. Paul was opened, but came to nothing. It was then agreed that Mr. Hill should open negotiations for purchase of the Burlington

shares through that company's board of directors—the only way in which they could be obtained. This was done and a price arrived at which the directors would recommend their shareholders to accept. In April, 1901, a proposal to the Burlington shareholders at that price was made by the boards of directors of the Great Northern Co. and Northern Pacific Co. and accepted by nearly all the shareholders, and those companies thereby became purchasers each of about one-half of the $108,000,000 capital stock of the Burlington Co., at the price of $200 per share, or about $216,000,000 in all, payable in the joint 4 per cent long-time bonds of the two companies.

The Circuit Court, in its opinion, following too closely the brief for the Government, says that the Burlington shareholders were paid for their shares in their own company's bonds, guaranteed by the Northern Pacific Co. and the Great Northern Co. A mere glance at the form of bond and the trust deed, (introduced by the Government, I, 508, 510) shows that no such "high finance" was practised.

The peculiar advantages of the Burlington system (comprising 8,000 miles of road) which made it so essential to the success of the enterprise that had been undertaken, were these:

Its lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas and Colorado, which afford the best markets for the lumber of the Pacific Coast. They reach Denver, Kansas City, Omaha and Aurora, where are located the principal smelters of silver-lead ores, such as are

mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City and Chicago, where are the great packing-houses and the great markets for the cattle and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon and Washington.

They reach St. Louis and Kansas City, connecting there with lines traversing the Cotton States, from which come the raw and partly-manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery and other manufactured articles that find a market in Japan and China.

(Mr. Hill, I, 671-2; Mr. Weyerhaeuser, I, 746; Mr. Harris, I, 750-752, 757-8).

The Burlington line southward from Minneapolis and St. Paul along the Mississippi River reaches the great coal deposits of Southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent great capacity and low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Missouri River, relieving the people and the railways of that territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain. (Mr. Hill, I, 673-7; Mr. Harris, I, 752-3; Mr. Saunders, I, 868-870).

And the low grade of this line also allows the hauling of return loads of iron ore from the mines in Minnesota to the smelters at St. Louis, thus reducing the cost of transporting coal. This ore traffic, which could not exist before the purchase of the Burlington shares, has already become important. (Mr. Hill, I, 677, 685; Mr. Harris, I, 756-7, 777).

That the time was near at hand when St. Paul and Minneapolis and the country to the westward could no longer depend on Pennsylvania and West Virginia for a supply of the fuel which (since the almost total destruction of the forests) has become absolutely necessary to make the country habitable, and that this need could only be supplied from the Illinois coal fields, and that the same condition confronted the two railway companies—all this was foreseen by Mr. Hill and was an additional inducement to the Burlington purchase. (Mr. Hill, I, 673-4).

Mr. Hill's anticipations have already been justified.

That the Burlington could not be utilized to advantage to supply the fuel needs of the Northwest under any joint-tariff agreement is pointed out by Mr. Hill, Mr. Harris and Mr. Saunders. While, as Mr. Saunders says (I, 871), the Burlington purchase will save the people in the territory served by these railways, 25 per cent on the cost of their fuel, yet this is not the greatest advantage. The main point is that it enables them to get fuel at all, and to get a cerain supply. (Id.)

The price paid for the Burlington stock was lower per mile of main track covered by the stock than that

for which the stock of any other large and well-established system, in the same general territory, could have been bought. (Mr. Hill, I, 148).

The purchase of the Burlington stock by the Northern Pacific and Great Northern Companies in equal parts would serve each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The evidence is therefore uncontradicted and conclusive that the Great Northern and Northern Pacific Companies each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on the Pacific Ocean, and as the best, if not the only means of furnishing an indispensable supply of fuel for their own use and for the inhabitants of the country traversed by their lines. These connections and the interchange of traffic thereby secured were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each

company in its competition with European carriers, for the trade and commerce of the Orient.

(3) In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, (Mr. Hill, I, 737; Mr. Harris, I, 759-762); or to lessen any competition between the purchasers. Such purchase was not intended to have, and it cannot have, any such effect.

In the Peter Power Case (from which much of the Government case is taken) an unsuccessful attempt was made to show that at the time of the purchase, the Burlington Co. was projecting extensions to the coast. And this testimony is adopted by the government in this case, (I. 137-9), and a further attempt is made to show the same thing by cross-examination of Mr. Harris, a witness for defendants (I, 759-762). Although no such charge is made in the petition, this cross-examination of Mr. Harris (having no relation to anything in the direct examination of the witness) was evidently an attempt to get material for a charge, afterwards made at the hearing below, that the purchase of the Burlington shares was made as a means of heading off extensions of that road into the territory of the purchasers—a charge insinuated, if not directly made, in at least one speech of a high officer of the Government during a recent political campaign, in which much space is devoted to this litigation, and it is positively stated that at the time of the purchase, the Burlington

system "was gradually pushing its rails northwesterly into the territory occupied by the purchasers, and westwardly to the Pacific Ocean." The total want of foundation for this statement is found in the very evidence introduced by the Government itself.

(4) It is charged in the petition (Par. V) that the purchase was made with a view of placing the Great Northern and Northern Pacific systems under a common source of control—that is, in view of the conspiracy therein set forth. But the testimony above referred to is conclusive against that charge. And it is directly refuted by Mr. Morgan in testimony introduced by the Government. He says (I, 334), "So far as the Northern Pacific Co. was concerned, nobody thought of the Northern Securities Co. at that time or dreamed of it." And later in the course of the same testimony he says that the thought of transferring the Northern Pacific shares to a stockholding company came to him after the raid of May, 1901, and in consequence of that raid. (I, 344-5). And Mr. Hill says that "the question of the Northern Pacific and the Great Northern ever being put into a common ownership was not thought of in that connection nor until long afterwards." (I, 686).

And it appears that after the purchase of the Burlington shares and as late as May 2, 1901, the treasurer of one of the Northern Pacific subsidiary companies sold a block of 13,000 shares of Northern Pacific stock—and not to these conspirators. (Mr. Hill and Mr. Mellen, I, 63).

And on this point Mr. Hill further says (I, 687) that at the directors' meeting at which the Burlington purchase was authorized a member of the board pointed out that as the Great Northern Co. would incur a joint and several liability on the bonds for the entire purchase price, it was a matter of consequence for it to know that the Northern Pacific would not pass into the hands of people who might be interested in other directions, in developing other sections of the country. Mr. Hill answered, referring to the holdings of Mr. Morgan and himself and their friends of Northern Pacific Stock, and he says:

> "I did not think at the time that it was at all likely that anybody would undertake to buy in the market the control of 155 millions of stock."

RESULTS OF THE BURLINGTON PURCHASE.

(1) Great Increase of Interstate and especially Asiatic Commerce and Consequent Reduction of Rates.

(2) That Commerce not Diverted from other Lines, but Created. Benefits to Shippers and Consumers in the Territory of all three Railroads. Sole Protection against Fuel Famine.

(1) Mr. Hill, I, 677, 682, 683-5, 715, 720-6, 730-1, 735-7.
Mr. Harris, I, 748-754, 757-8, 767-8, 773, 776-7.
Mr. Mellen, I, 864-5.

(2) Mr. Hill, I, 735-6.
Mr. Mellen, I, 862-3.
Mr. Hill, I, 676, 678, 684-5, 731-4.
Mr. Weyerhaeuser, I, 746-7.
Mr. Harris, I, 750-1, 753-4, 765, 774, 777.
Mr. Saunders, I, 867-872.

(1) It would not have been singular if the period between the acquisition of the Burlington shares (the bargain for which was made in April, and the title finally acquired upon payment in the joint bonds in September, 1901), and the taking of defendants' evidence in October, 1902, had shown no marked growth in the commerce of the purchasers. A new channel opened for commerce cannot be filled at once, especially if that commerce has to be in

great part created. The absence of any such increase would not have been surprising, even if no unusual obstructions had been interposed. But, as already pointed out, the certainty of the duration of the connections and facilities—the permanence of the conditions—created by the purchase lie at the basis of every considerable undertaking of miner, manufacturer or other shipper whose business would be served by these lines. And ever since the bargain in April, 1901, that certainty has been brought in question. At the outset came the acquisition of a majority of the Northern Pacific shares by interests hostile to the use for which the Burlington shares were purchased. The defeat of this attempt had hardly become known to the public when individuals, principalities and powers, from the Peter Power syndicate to the Government of the United States, commenced a succession of suits in which not only was the Securities Co. attacked as the fruit of a conspiracy in restraint of commerce both local and interstate, and as itself a combination to restrain and monopolize such commerce, but the Burlington purchase was assailed as made with a view to carrying out such conspiracy, a step in carrying it out. And during all that period, the same charges have been reiterated in a considerable portion of the press and on political platforms. In view of these concerted and persistent and widespread attacks, which could not fail to throw doubts on the permanence and stability of the relations between the lines of the purchasing companies and those of the Burlington, there would be slight cause for surprise if during

this period there had been little or no increase of traffic as a result of the purchase.

But even in the face of all these opposing influences, the evidence shows a very marked, and in respect to some commodities, a marvellous increase of commerce. Without quoting all that is said by the witnesses in the passages cited above, it is enough to refer to one or two items. Between June 30, 1900, and June 30, 1901, the Great Northern shipments of cotton piece goods was 13,070 bales; of raw cotton 13,230,000 pounds. In the year ending June 30, 1902, the shipments were: piece goods, 64,542 bales; raw cotton 41,243,000 pounds (Mr. Hill, I, 682). And the general increase of that company's traffic has been 33 per cent and its foreign commerce has more than doubled (I, 736). The coal traffic between the Illinois mines and points on the Great Northern and Northern Pacific railways has grown from small dimensions to a great business, and as a result, large shipments of iron ore from Minnesota to St. Louis in the returning coal cars have been made possible, have begun and are increasing. Seventy to one hundred thousand tons were engaged for shipment in the last winter, with the prospect of an increase to 300,000 tons before spring. (Mr. Hill, I, 677; Mr. Harris, I, 777).

(2) That this increase of traffic is not by diversion from other roads, but is commerce that has been created, is the statement of each of the witnesses cited.

In Mr. Hill's cross-examination, a good deal of ingenuity was wasted (I, 735-6) in the attempt to make it appear that the Burlington purchase had not resulted in creating traffic, but merely in diverting it from other roads. But Mr. Hill says (I, 736): "It has *created* traffic," and goes on to state to what extent. Mr. Mellen's testimony is to the same effect (I, 862-3).

Mr. Harris, while he cannot speak as to details, is confident that on the Burlington lines traffic has increased in consequence of the purchase. (I, 775), although as yet (i. e. at the date of his testifying, October, 1902), the advantages of the purchase have accrued in but a small degree compared with what will come "when the question as to whether things that have done and put together are going to stay together or be torn asunder," is settled (I, 773). He mentions the preparations being made by the Burlington, by various improvements in its road, to provide for the great increase of traffic which that company, at least, looks forward to as a consequence of the purchase. (I, 765, 768).

As to the effect of the purchase on the general prosperity of the country along the Burlington lines, he makes this striking observation—and of his capacity to form an opinion there can be no question:

> "I think that was the very best disposition that could have been made of the property for the interests of the merchants and the manufacturers and the industrial population and the agriculturai population along the Burlington road. I think it gives them additional resources, aids in the development of latent resources, and represses none." (I, 774).

This increase of traffic has been attended with a very large reduction of rates, on both competitive and non-competitive business (Mr. Hill, I, 684, 720-726, 730-1).

If defendants' witnesses were to be examined now (they were examined in October, 1902); and if their testimony agreed with the concurrent opinions of the large coal dealers in St. Paul and Minneapolis, they would say that Mr. Hill's forebodings of an approaching bituminous coal famine in the Northwest, and his judgment that the Burlington road furnished the only safeguard against such a calamity, had been fully justified, and that it is the through shipments from the mines reached by the Burlington road, made possible by the purchase of its shares, that have saved much of the country along the lines of the purchasing companies from such a famine, and have made it habitable during the last winter.

(1) **The attempt of Hostile Interests to gain Control of the Northern Pacific Shares.**

(2) **How the Attempt was Defeated.**

(3) **Effect of it, if successful, on Northern Pacific and Great Northern Properties and their Enterprise, and the Value of their Shares. Would not so much Divert Commerce as destroy it.**

(4) **Classes of Northern Pacific Stock; Retirement of Preferred Stock.**

(1) Mr. Hill, I, 46-49, 50, 52-55.
Mr. Schiff, I, 262-3, 271.
Mr. Steele, I, 280-282.
Mr. Morgan, I, 337.

(2) Mr. Hill, I, 48, 50-51, 52, 55-6, 60, 64.
Mr. Steele, I, 284-286, 287-8.
Mr. Morgan, I, 337-342.

(3) Mr. Hill, I, 65, 66, 84; I, 694-5, 738-9, 740, 742.

(4) Mr. Hill, I, 57, 64-5, 80-82, 101-2.
Mr. Mellen, I, 170-1, 172.
Mr. Kennedy, I, 217-8.
Mr. Perkins, I, 239.
Mr. Steele, I, 301, 305-312.
Mr. Morgan, I, 323-5, 366-7.
Vol. I, 381-2; Ex. 4.

(1) What Mr. Hill thought so unlikely—that anyone should undertake to buy in the market the control of 155 millions of stock, a thing absolutely without precedent—actually came to pass within a fortnight. In the earliest days of May, 1901, J. P.

Morgan & Co. learned that the large purchases of Northern Pacific shares that had been recently made were made by what the witnesses call the "Union Pacific Interests"—that is by persons closely identified with that road and acting in its interest. It was afterwards learned that these purchases comprised 41 millions of the preferred and 37 millions of common stock, making in all 78 millions, a clear majority of the 155 millions of capital stock of the company. These same interests had already applied to share in the Burlington purchase, and their request had been refused. (Mr. Hill, I, 44-6). The Union Pacific Co. owned all the shares of the Oregon Short Line Co. and with it owned all the shares of the Oregon Railway and Navigation Co., (Mr. Harriman, I, 603, 608), and was a direct competitor with the Northern Pacific Co., and could not be suspected of making such enormous purchases out of any desire to promote the interests of the other shareholders of that company, or of that company itself, or its business—and least of all its interests involved in the purchase of the Burlington shares. This was the opinion of J. P. Morgan & Co., "and that we would probably be looked to by the minority shareholders or outstanding shareholders to protect the Northern Pacific road from going into control of anybody else." (Mr. Steele, I, 281). That firm had had absolute control of the reorganization of the company in 1896 (Mr. Morgan, I, 314). They had ever since been its fiscal agents, and also members of the voting trust till its termination January 1, 1901. (Id. 317-8).

(2) Mr. Morgan says (I, 338):

> "When I heard that, I felt in this position. We had reorganized the Northern Pacific. We had placed all the securities of the Northern Pacific. * * * I feel bound in all honor when I reorganize a property, and am morally responsible for its management, to protect it, and I generally do protect it; so I made up my mind that it would be desirable to buy 150,000 shares of stock, which we proceeded to do, and with that I knew we had a majority of common stock, and I knew that actually gave us control, and they couldn't take the minority and have it sacrificed to the Union Pacific interests."

Mr. Steele also testifies (I, 282) that "we decided that it was important and there was a moral obligation upon us to endeavor to secure the stock, and my firm proceeded to purchase Northern Pacific common stock."

They did this between May 1 and May 7, buying about $15,000,000 of common stock (Mr. Steele, I, 284, 285).

Before making this large purchase, Mr. Steele ascertained from Mr. Hill that he and his friends would not part with their common stock (Mr. Steele, I, 282,) and they both understood that the preferred stock was to be retired (Mr. Steele, I, 282-3; Mr. Hill, I, 62, 64).

Mr. Morgan's knowledge that with a purchase of 15 millions of (common) stock "we had a majority of common stock," was based on these facts:

His own firm held before the purchase about 4 or 5 millions and after the purchase about 20 millions (Mr. Steele, I, 285-6).

In the reorganization, Mr. Hill and three others received 3 millions of common stock (Mr. Hill, I, 145).

Afterwards, and in 1896, he bought for himself and several friends (on individual and not joint account) about 26 millions. (Mr. Hill, I, 145; Mr. Kennedy, I, 212; Mr. Morgan, I, 317 and note). Of the 29 millions thus obtained in 1896, they held early in May, 1901, about 20 millions. (Mr. Hill, I, 48). These sums, together with other amounts held by friends of J. P. Morgan & Co., made up a total of between 41 and 42 millions—a clear majority of the common stock (Id. I, 48; Mr. Steele, I, 298).

Mr. Morgan's confidence that the holding of a majority of the common stock would defeat the hostile plans of the holders of a majority of all the stock of the company, and protect the company from a hostile control was based on the character and conditions of the preferred stock, as provided in the resolutions under which it was issued (I, 375, 381-2, 384). By those resolutions each share had equal voting power with a share of the common stock, but the company had power to pay off at par and retire all or any part of the preferred stock on the first day of January of any year up to 1917.

The preferred stock was regarded as

> "Simply a temporary loan until we should issue the common stock at par and take it up; and consequently in dealing with the question, the question simply was when the directors of the Northern Pacific should decide that it was expedient to do so." (Mr. Morgan, I, 325).

In the fall of 1900, Mr. Morgan considered that this stock might and should be retired in the near future, but preferred that this should be done by a board of directors chosen directly by the shareholders after the voting trust should have been dissolved. (Id. I, 323).

Upon the retirement of the preferred stock, the 80 millions of common would be the only outstanding stock of the company. Messrs. Hill and Morgan and their friends, having a majority of this, would also be in position to retain that majority when the rest of the capital (75 millions) should be issued as common stock to take the place of the retired preferred stock, and so continue in "complete control." (Mr. Hill, I, 65). They would be entitled to the same proportion of the new as of the existing common stock,—of course, on payment for it at par—i. e., on payment of about $39,000,000.

The power to retire the preferred stock was considered by Messrs. Morgan and Hill to be in the board of directors—not in the body of the stockholders. It was afterwards exercised by the board, and their action was sustained by the courts in Minnesota and in New York. The board at that time had been nominated by the voting trust— i. e., by J. P. Morgan & Co. The annual meeting for choice of a new board was to be in October. At that meeting the Union Pacific interests could elect the board. Should the existing board in the meantime have taken action for retiring the stock on January 1, 1902, could its action be revised and nullified by the stockholders' meeting or by the new board? And

if there was danger of this, could not the present board amend the by-laws by which the date of the stockholders' meeting was fixed in October, so as to fix it in January after the stock should have been actually paid off and retired?

These details—all found in the evidence introduced by the Government—are important as showing how nearly the Union Pacific interests succeeded in their attack, and the principal cause of their failure. It would seem that they were ignorant or ill-advised as to the seat of the power to retire the preferred shares. Otherwise, instead of buying 41 millions of preferred and only 37 millions of common, they could not have failed to buy 41 millions of common and only 37 millions of preferred. In that case they would have had absolute control, whether the preferred stock was retired or not.

Any question as to the ultimate stock control of the company was soon put at rest. During the operations of the opposing parties many persons had sold them stock they did not own. The competition between these persons to buy stock for delivery pushed the price of common stock at one time to $1,000 (on May 9, 1901,) and threatened a general panic, and caused a stringency in the money markets of the world. It would seem that persons who had just bought 78 millions of stock on credit must have been of all the most desirous of allaying the tempest. However this may have been, and whatever the reason for their action, they did, at a meeting of bankers and others held to devise means for relieving the financial situation, agree that Mr.

Morgan should have power to name the board of directors to be chosen at the October election. This of course sealed the fate of the preferred stock beyond a peradventure, and left the stock control of the Northern Pacific Co. absolutely with Mr. Hill and Mr. Morgan and their friends. (Mr. Hill, I, 50-51, 55-6, 61-2, 63; Mr. Steele, I, 287-8).

It was claimed by the Government in the Circuit Court that at this meeting the retirement of the preferred stock was agreed on. But Mr. Harriman testifies (I, 903) that as late as November, 1901, he considered that he had a controlling interest in the Northern Pacific Co., although "there was a probability that there would be an effort made to retire that stock without our consent." And see Mr. Hill's testimony, I, 68, 99.

It was further claimed that at this meeting directors representing Union Pacific interests were agreed on for the Northern Pacific. And a Wall Street newspaper was offered as proof of this.

But at this time Mr. Morgan was in Europe. His partner, Mr. Steele, who attended the meeting, denies any such agreement. He says that the first suggestion of naming any directors from the Harriman party came from himself in conversation with Mr. Morgan, after the latter's return from Europe in July. (Steele, I, 287, 294-5).

Mr. Morgan (I, 342-4) says that in making the appointments in July, he acted in entire independence, and "I think that the people that were more

than surprised that they were put on, were the Union Pacific interests themselves. * * * It showed that we had nothing to fear from it."

Mr. Hill, (a witness for the Government) says:

> "Q. Was there at that conference, Mr. Hill, any agreement among the parties to it as to the Union Pacific being represented on the board of the Northern Pacific?
> A. There was not.
> Q. No understanding with reference to that?
> A. None whatever."
>
> (I, 60, and see 58, 59, 61, 68-9).

(3) The very great injury which the success of the "raid" would have wrought to the Northern Pacific shareholders and to that company, and especially to its interests under the Burlington purchase and the traffic to result therefrom, seems hardly to require proof; but abundant proof is furnished by what was done to defeat it and prevent a repetition of it. And the passages cited above contain direct evidence on this point. Thus Mr. Hill says (I, 742):

> "The value of the property would be destroyed. Its growth would be restricted. It would be controlled in the interests of another property or body, for the reason that it would be restricted or might be restricted so as not to interfere with the growth of the other property."

And the injury to the Great Northern would be no less. Besides its effect on the general interstate business of that company, the control of the Northern Pacific by the Union Pacific would deprive the Great Northern of the benefit of the Burlington con-

nection, to acquire which it had incurred a joint and several liability of over $200,000,000, and would deal a fatal blow to the commerce to which that connection was absolutely essential.

In his testimony in the Peter Power case, introduced by the Government, Mr. Hill says that in such case there would have been nothing left for the Great Northern shareholders to do but to sell out to the Union Pacific (I, 65, 66, 84).

Testifying for the defendants in this case, he says (I, 694):

> "With the Northern Pacific as a half-owner in the shares of the Burlington and responsibility for one-half of the purchase price of these shares, the transfer of the shares of the Northern Pacific or the control of the Northern Pacific to an interest that was adverse or an interest that had greater investments in other directions, the control being in the hands of companies whose interests would be injured by the growth and development of this country, would of course put the Great Northern in a position where it would be almost helpless, because we would be, as it were, fenced out of the territory south which produces the tonnage we want to take west and which consumes the tonnage we want to bring east; and the Great Northern would be in a position where it would have to make a hard fight—either survive or perish—or else sell out to the other interests. The latter would be the most business-like proceeding.
>
> "Q. What would be the effect of such an acquisition by a hostile interest on the minority stockholders in the Northern Pacific?
>
> A. Why, it would, practically put the control of the Northern Pacific interest in the hands of people who were hostile to its growth or development. *The measure of injury would be destruction.* It would destroy the entire

plan upon which the whole enterprise was originally designed and carried out, as far as it had been carried out.

Q. That is, your plan for building up a great interstate and Oriental traffic?

A. Yes, sir; and the conditions under which that business should be done, because the other lines could not—it was a physical impossibility for them to carry at the rates that are necessary to carry it, and the rates that we must make, without making a positive loss on the business.

Q. So that, in effect, they would not only deprive you of that commerce, but they would destroy the commerce itself?

A. Destroy the commerce itself."

After stating in a passage too long for quotation why the other lines could not carry on this commerce—could not make rates in competition with the high seas and the Suez Canal—and being asked if there was any other motive in having the Securities Co. acquire a majority of the Northern Pacific stock than to defend and protect the interest of the stockholders and the enterprise he had spoken of, Mr. Hill says (I, 695):

> "The object and the intent was to defend the property that otherwise would be destroyed, both of the Northern Pacific and the Great Northern. When I say *destroyed*, there would be something left, but the main plan would be destroyed; there would be something left, but the property would be incapacitated from doing what it was intended to do and what it was quite able to do."

On cross-examination by the Government, Mr. Hill again describes (I, 738-740) in what manner the Union Pacific control of the Northern Pacific would operate to prevent the use of the Burlington

as a means of developing the commerce which his company "had worked long and hard to establish." And to the suggestion of the Government counsel that it was a mere matter of competition, and the only effect would have been that "competition would have been so severe you could not have stood it?" he replies, (I, 740):

> "It was not a question of competition. It was a question of physical inability to reach the market. We would be shut out from the markets."

(1) **Original Plan of a Stockholding Company. Its Purpose. Confined to a few Great Northern Minority Shareholders. Privilege to be offered to other Great Northern Shareholders.**

(2) **Lesson of the attempt to gain Control of Northern Pacific Stock. Defence Against Future Attacks. Majority of Northern Pacific Shares, but not a majority of Great Northern Shares, Expected to be Transferred to Proposed Company, but this not a condition. New Company to be open to other Northern Pacific Shareholders as well as those of Great Northern Co.**

(3) **No Agreement among Promoters to transfer their Shares to New Company.**

(4) **New Company to hold also other Stocks besides the Railway Shares.**

(1) Mr. Hill, I, 82-5, 87, I, 690, 706-8.
Mr. Kennedy, I, 190-1, 192.
Mr. Steele, I, 301.
Mr. Harriman, I, 632.
Col. Clough, I, 783, 810-2.

(2) Mr. Hill, I, 83-4.
Mr. Kennedy, I, 193-5, 196-7, 215, 221.
Mr. Perkins, I, 241.
Mr. Steele, I, 289-290, 299.
Mr. Morgan, I, 344-6, 347-9, 354-5, 356, 361-2, 363.

(3) Mr. Hill, I, 110, 114.
Mr. Kennedy, I, 215-6, 221-2.
Mr. Perkins, I, 241.
Mr. Steele, I, 303-4.
Mr. Hill, I, 700.
Col. Clough, I, 788.
(4) Mr. Hill, I, 87, 126-7, 129-130.
Mr. Kennedy, I, 197-8.
Mr. Morgan, I, 346.

(1) Their narrow escape from so great a danger being assured, it was the part of prudent men to profit by the lesson so rudely taught and to devise means of defense against, or better still prevention of any repetition of the attack which had so nearly proved successful. The Union Pacific interests still held 37 millions of the Northern Pacific common stock. Between one and two millions were not held by either of the parties. The loss of three millions from the majority holdings might occur from various causes, and the attack just defeated might be renewed with success by the same or other assailants.

Now, there had been for some years a project on foot, in which Mr. Hill and several other shareholders of the Great Northern Co. (who held at this time some 32 or 33 millions, or about 27 per cent of that company's stock) to form a corporation to which they should transfer their shares in consideration of shares of such new company. Mr. Hill gives the names of the others as follows (I, 698): Mr. Kennedy, Lord Strathcona, Lord Mount Stephen (represented by Mr. Sterling), D. Willis James, Samuel Thorne, Johnston Livingston, Col. Lamont, Oliver Payne, Edward Tuck, George C. Clark and George

F. Baker. They had taken an active interest in the operations first of the Manitoba Co. and then of the Great Northern Co. (some of them from the inception of the Manitoba Co. in 1879) and had been those most consulted by Mr. Hill, regarding the policy of the company. Some of these gentlemen were advanced—a few of them far advanced—in years, and in case of their death their shares were liable to be scattered. And it was the general wish that their shares should be kept together and voted as a unit at the meetings of the company for the continuation of the policy which had proved so highly successful, and that if sold, they should all fare alike. These gentlemen had never "controlled" the company. In a sense the control had been with Mr. Hill (I, 706), to whom nearly all the shareholders who did not personally attend the meetings and vote with him, had uniformly sent their proxies (Mr. Kennedy, I, 191-2). But such "control" was in no way the result of stock ownership. It was simply that the management and policy of Mr. Hill had been always approved by the shareholders, as well those who were not as those who were among the number who are called in the evidence his associates, and who projected the stockholding company just spoken of (Col. Clough, I, 808).

This project had been the subject of discussion between not more than two or three of these gentlemen at a time for several years, but there had never been anything like a meeting to consider details or even to formulate a definite plan (Mr. Kennedy, I, 190-1). That such a project was on foot was, how-

ever known to others besides those engaged in it. Mr. Morgan had heard of it (I, 344) and Mr. Steele (I, 299), and even Mr. Harriman (I, 632).

The Great Northern shares have always been at a considerable—usually at a very high—premium, so that the capitalization of the proposed company would be largely in excess of the par value of the Great Northern shares transferred to it. The company was to be absolute owner of the shares transferred to it, with full power to vote or sell them as its directors elected by a majority of its shareholders should determine. While each shareholder in the new company could sell his shares, yet the Great Northern shares held by the company, while held by it, would be a unit for all purposes of voting, etc., and in the event of any opposing interest arising to break the perfect harmony that had always prevailed among the shareholders, such interest could not acquire the control or the vote of a single one of the Great Northern Co. shares held by the new company, without acquiring a majority of the shares of the new company (Col. Clough, I, 810-812).

It was also contemplated that the company might acquire and hold stock in other corporations whose operations might aid the railway and whose shares could not be held by that company (Mr. Hill, I, 87). And Mr. Morgan seems to have been aware of this (I, 346).

At least a year before the spring of 1901 there was a general feeling among those projecting the company that each shareholder in the Great Northern should have the opportunity to come into it on the

same terms as the projectors. This was solely because they didn't wish to be in the position of making a corporation and closing the door on their old associates—a reversal of the relations that had always existed among the shareholders of the Great Northern Co. (Mr. Hill, I. 82-85, 87; 690, 706-8; Mr. Kennedy, I. 190-192; Col. Clough, I. 790-1).

This was the situation of the original plan of these Great Northern minority shareholders in May, 1901.

(2) When Messrs. Hill and Morgan and their associate shareholders in the Great Northern Co. and the Northern Pacific Co. set themselves to devise means to prevent the recurrence of such a "raid" as had just been defeated, it was very clear to them that they must depend for safety wholly upon themselves. The law gave them no protection. They had every reason to believe that such a holding as that of the Union Pacific Co. in the Northern Pacific is in no way forbidden by the Anti-trust law, and they knew that just such holdings had existed for years among all the principal railways of the East. The inaction of the attorney general showed that this was also the opinion of that high official specially charged with the enforcement of the Anti-trust Act. And so far as that act is concerned, the acquisition and holding, by an interstate railway company, of a majority of the shares of a competing interstate railway company is strictly legal, though it may be, as the Union Pacific holding of Northern Pacific would

have been, "iniquitously legal." This will be fully shown in the argument on the construction of that act.

In this state of things and early in June, 1901, Mr. Kennedy, on his return from Europe (whither he had gone on April 2, returning on June 8th—I, 185, 190), expressed to Mr. Hill his opinion that "we must devise some plan to prevent hereafter such raids as have occurred" (Mr. Hill, I, 689), and suggested to Mr. Hill the utilizing for that purpose of their proposed holding company by including in it their Northern Pacific in addition to their Great Northern stock (Mr. Hill, I, 84-5). This suggestion did not include a majority of Northern Pacific shares, but only those of Mr. Hill and his associates in the Great Northern Co.—did not include the shares of J. P. Morgan & Co. (Id., I, 127).

Shortly after Mr. Morgan's return from Europe, the question of forming some sort of company to acquire and hold the Northern Pacific shares held by J. P. Morgan & Co. and their friends (including the $15,000,000 bought by the former), was discussed by him with Mr. Steele (I, 290).

Mr. Morgan's own statement is as follows (I, 344):

> "When we found ourselves in this position, with the danger—having escaped as I thought at that time from what I thought was a great danger, that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want it to go on indefinitely; and I thought the best

> plan was to go to some trust company to take the Northern Pacific stock and hold it. * * * We didn't want convulsions going on. * * * What I wanted to accomplish was to put that stock so that it would be protected—to maintain the policy of the company as it then existed. * * * I wanted it so that I could go to Europe and not hear next day that somebody had bought it for the Boston and Maine or I don't know what other company. I wanted the Northern Pacific stock put where nothing could interfere with the policy I had inaugurated, and for the carrying out of which we were perfectly satisfied and morally responsible."

But the idea of a trust company was quickly abandoned, for it would cost less to buy up the stock of the trust company than of the railway company (I, 356).

On page 347 he says: "Everything, so far as the Northern Pacific road is concerned and a holding company, all occurred to my mind subsequent to the 9th day of May."

Being asked (still on examination by plaintiff): "When did the idea of putting the control of *both* these roads in one place come up after your return?" he says, (I, 345):

> "I suggested to Mr. Hill, 'why not.' I think I did, at any rate. If it was not, it may have been Mr. Steele. Whether I did or J. P. Morgan & Co., I think we are responsible for having made that suggestion."

This was just before he went to California, which he did early in October (I, 346).

Asked the result of his talk with Mr. Hill, he says (I, 348):

> "The result of it was that we decided that

> the Northern Pacific—so far as I was concerned as a stockholder in the Northern Pacific, I would put my stock in, provided that he would take everybody else's into this thing that he had proposed to arrange for the Great Northern. * * * I didn't care whether he went in or not. We had a majority without him. I wanted a majority of the Northern Pacific stock in the Securities Company. I didn't care who went in provided there was enough there to protect the Northern Pacific * * * (I, (349). Mr. Hill and I worked together. * * * We worked simply because he was a stockholder; but I was independent of Mr. Hill in that transaction. I wanted simply to keep the stock of the Northern Pacific safe beyond question."

And asked as to whether there was not some understanding with Mr. Hill that he should go in, and whether he would not have been much surprised if Mr. Hill had not done so, Mr. Morgan says (I, 349): "Simply because I know he wanted to make the most he could out of the Northern Pacific"—i. e., as a shareholder.

In the interval between Mr. Kennedy's suggestion to Mr. Hill in June that their plan for a holding company of Great Northern stock should be enlarged so as to include the holding (about 20 millions) of themselves and their associates in Northern Pacific, and the time when Mr. Morgan decided to put his firm's Northern Pacific shares into the same company, that suggestion developed into a plan for enlarging the scope of the company so that it should have power to acquire all of the 42 millions of Northern Pacific common stock (being a majority of such stock) then held by Mr. Hill and

Mr. Morgan and their respective associates. "We were particularly anxious to put a majority of that stock where it could not be raided again as it had been" (Mr. Hill, I, 693). And Mr. Kennedy, asked why it was planned to get a majority of Northern Pacific and not of Great Northern, says (I, 195): "Well, my idea was in consequence of what took place last May. We didn't want to be subject to such an attack as took place last May." The price at which the stocks should be taken by the new company came up, and it was considered that $180 per share for Great Northern and $115 for Northern Pacific would be a fair valuation (Mr. Hill, I, 86, 96). It was still the purpose to give all Great Northern shareholders who might desire to come in an opportunity to do so (Mr. Kennedy, I, 197; Mr. Hill, I, 87, 690, 708). The matter of capitalization so as to provide for acquiring, at the prices suggested, a majority of Northern Pacific shares, should they be offered and whatever Great Northern shares might be offered by their holders, and also for acquiring other properties as contemplated, was considered (Mr. Hill, I, 87, 690-2, where the basis of proposed capitalization is stated).

For these purposes a capital of 300 millions was thought to be enough, and up to the middle of September it was hardly deemed necessary to make it larger (Mr. Hill, I, 692). The conferences during this period were of the same character as the earlier ones had been; there was no meeting, but Mr. Hill discussed the matter from time to time with one

and another of his friends (Mr. Hill, I, 87; Col. Clough, I, 821, 822, 829).

The advantage of including the Northern Pacific shares in a company open to all Great Northern shareholders, instead of forming a separate holding company for the 42 millions of Northern Pacific shares, was obvious from the increased capitalization resulting therefrom. Should all Great Northern shareholders come in, the acquisition of their 125 millions at $180 would take $225,000,000. If less than all came in, then of course so much less of the capital would be required for that purpose. The valuation ($180) of Great Northern shares was thought likely to deter the holders from coming in, their market price being from $187 to $195 and so on to $200 (Mr. Hill, I, 692). Should it have that effect, then so much of the capital provided for acquiring Great Northern shares as was not required for that purpose could be utilized for the other purchases and operations of the company. Such purchases had been part of the plan for the company for a long time, if not from the outset. Mr. Hill had so told Mr. Morgan two years before (Mr. Morgan, I, 346-7).

The process by which the capitalization of the proposed company was increased by various considerations and suggestions until it was finally fixed at 400 millions, is also stated by Col. Clough (I, 789-792).

An error in the opinion that would not be worth noting except for the court's profession of absolute accuracy, is found in the statement (II, 1704) that

the Securities Co. "was organized * * * with a capital stock of $400,000,000, that sum being the *exact* amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor." The "exact amount" would be $403,250,000.

While every Great Northern shareholder was to be given an opportunity to come into the new company, this was not in order to give the new company control of the stock of that company, but for the reason already stated.

Mr. Kennedy, being asked whether the opportunity given to all Great Northern shareholders was for the purpose of placing a majority of Great Northern as well as of Northern Pacific shares in the Northern Securities Co., says (I, 197):

> "I think not. The idea was to give the Great Northern shareholders who might desire to come in an opportunity to come in, that they might not feel that they were not fairly treated if certain persons went in and other persons left out."

And elsewhere he says (I, 195):

> "It was our intention to have a majority of the Northern Pacific; but as to the Great Northern it was simply an intention to let the members in who chose to come in, and it remained to be seen whether it would be a majority or minority."

And Mr. Hill, on cross-examination, by the Government, after giving the same reason as Mr. Kennedy why the Securities Co. was thrown open to all Great Northern shareholders, says (I, 708):

"If the question has reference to the desire

> or preference, I should answer that if the individual men who formed the Securities Co. had their choice, and all the stockholders were there and could say: 'We release you'—we would have preferred to have had the Northern Securities Company stock restricted to the 35 millions." (That is to their own holdings, which were from 33 to 35 millions, of Great Northern stock). "There isn't any question about that. The question was, 'Shall we make a corporation and close the door on our old associates?' If we do, it is the first time that anything has ever been done in which any shareholder had the advantage over all the shareholders. *And that was the reason for making the offer, and the only reason for making the offer.*"

And yet, in the face of this testimony, which is no where contradicted or qualified, the Circuit Court in its decision says (II, 1704), that the individuals who planned the Securities Co. not only "agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey Company when the same should be fully organized," but that these same persons also

> **Agreed with each other * * * to use their influence to induce other stockholders in their respective companies to do likewise to the end that the New Jersey company might, become the sole owner of the whole or at least a major portion of the stock of both railroad companies.**

Whether as regards Mr. Hill and his friends, owning both Great Northern and Northern Pacific shares, or Mr. Morgan and those represented by his firm, the above is as destitute of evidence to support it and in as complete antagonism with the record, as the statement (see page 34, *supra*) that the pur-

chasers of the Burlington stock paid for them with that company's bonds, or the statement, soon to be noticed, that the Securities Co.'s purchases of Great Northern shares from others than the promoters were made by means of "the advice, procurement and persuasion of those stockholders of the Great Northern Co., who had been instrumental in organizing the Securities Co., and had exchanged their own stock for stock in that company shortly after its organization" (II, 1705).

As already stated, Mr. Morgan, about October 1st, expressed a willingness to put the shares of his firm and their friends into the proposed company. He continued to be governed by the sole wish to protect the Northern Pacific Co., which he considered himself to be under a moral obligation to do. He did not care much what else was in the company, so long as a majority of the Northern Pacific stock was there. He did not consider that he was planning or forming a company, but considered that he was merely going into one already planned by Mr. Hill. He says (I, 354):

> "Mr. Hill did not decide the Northern Pacific. I told him I thought if he was willing we would take it; and that was probably some time either just before (I went to) or just after I returned from California. * * * I told him that would be my decision if everything went smooth. * * * That was satisfactory to me if it was to him. We both agreed to it. * * * He was acting for his stock and I for mine, with the condition that if the Northern Securities Company was organized, the holders of the Northern Pacific stock should have the right to put in their stock the same as we did."

And of the influence of the large capitalization of the new company (the result in great measure of its being open to all Great Northern shareholders) upon his own action, Mr. Morgan says (I, 356):

> "That is another advantage I took into account, and that was that the capital of the Northern Securities Company was so large I did not believe in a night or a week anybody would ever be able to get control of it."

Asked what special benefits accrued from putting the shares of both railways in one company, he says (I, 356):

> "Because it seemed to me the best remedy; the company is so large, * * * I wanted to put it in a company with capital enough that nobody could ever buy it, and that is the only one I know of. It is the only investment or trust company that I know of, of that kind where the stock was large enough so that in all human probability I felt that if it was not safe there it was not safe anywhere."

(As to Mr. Morgan's mention of a "trust company," see his explanation, I, 361).

Asked whether a number of the larger stockholders of the Securities Co., acting together, could not control both roads, Mr. Morgan says (I, 356):

> "No, sir; I do not think it would be possible. If you go and select all the stockholders—of course, I have no doubt if you had a list of the stockholders, and take all the largest until you get over $200,000,000, those people would control; but there is no interest that I know of today that can control the Northern Securities Company."

About the time that Mr. Morgan, as before stated, announced his purpose of transferring his firm's Northern Pacific shares to the proposed company, with reservation of the same right to others, and probably in connection with that transaction, the capital of the company was fixed at 400 millions, the sum named afterwards in its articles. Mr. Hill thinks this was arrived at some time in October (I, 693).

(3) While it was desired and expected that a majority of the Northern Pacific common stock should be transferred to the new company (Mr. Hill, I, 115, 693; Mr. Kennedy, I, 221), there was no agreement on the part of any of the holders to transfer his shares. Each was free to do as he liked. The same was true as in respect of the Great Northern shares held by Mr. Hill and his associates. It was not a condition of the formation of the Securities Co. that a majority of the shares of either company should be transferred to it.

Mr. Kennedy says (I, 215):

> "Q. Did you understand that the formation of the Securities Co. was in any way conditional upon its acquiring a majority of the stock of both railroad companies?
>
> A. No, sir; no such condition.
>
> Q. Well, was it or was it not decided to form it whether it procured—
>
> A. Whether it procured a majority or whether it did not.
>
> Q. Did you know of any agreement between the majority stockholders of the Northern Pacific Company that they would all turn their

stock in or sell it to the Northern Securities Co.?

A. I know of no such agreement; never heard of it."

Mr. Kennedy also says (I, 221):

"Q. Was it not generally understood between you that the parties who were acting with you and had acted with you during this flurry, and who had stood together, were agreed on the general plan or policy of putting their holdings into the Securities Co.?

A. I don't recall any general agreement about it. * * * Personally I supposed that a majority of that stock would go into the Securities Co.—of the Northern Pacific common stock.

Q. So that at the time you planned the organization of this present Securities Co. it was pretty generally understood that all of you gentlemen would put your holdings in there?

A. I supposed they would. I had no positive information on the subject. They were free to do as they pleased.

(I, 222): Q. And it was your plan and purpose, and the plan and purpose of those who organized the Securities Co. to have the stock go in there?

A. If the people chose to sell it. We couldn't compel it."

Mr. Perkins says (I, 241):

"Q. Was there any agreement between J. P. Morgan & Co. or J. P. Morgan and his associates and Mr. Hill and his associates, to organize the Northern Securities Co. and to transfer to it the ownership of a majority of the Northern Pacific and Great Northern Railway Companies' stock?

A. Not to my knowledge.

Q. Was there any agreement of any such character?

A. Not to my knowledge."

Mr. Steele says (I, 303-4):

"Was the fact of acquiring a majority of the stock of both or either the Northern Pacific or Great Northern Railway Companies made a condition of the organization of the Securities Co. as far as you know?

A. Not to my knowledge, sir.

Q. Well, do you know that it was determined to form the Northern Securities Co., without knowing whether they would acquire a majority of either one of the companies, either the Northern Pacific or the Great Northern?

A. I have always understood that it was intended to form that company anyhow, independently of getting any Northern Pacific stock whatever, and independently of getting a majority of the Great Northern stock as I have already testified. I understood that company was to be formed originally to hold the Great Northern stock which was owned by Mr. Hill and some of his associates, which I understood amounted to about 30 to 35 millions.

Q. Was there any agreement between J. P. Morgan & Co. or J. P. Morgan and his associates to organize the Northern Securities Co. and to transfer to it the ownership of a majority of the Northern Pacific and Great Northern Railway Companies' stocks?

A. None whatever.

Q. Was there any agreement of that character?

A. Not to my knowledge.

Q. In the organization of the Northern Securities Co. did your firm speak for a majority of the stockholders of the Northern Pacific, or act at all other than for your own personal interests—your own interest? Or did you have anything to do with organizing the Northern Securities Co. other than to sell to it your stock?

A. I was about to answer that I have already testified that we had nothing to do with the organization of the Northern Securities Co.;

and the first connection that we had with it was the negotiation by which we sold it to it the Northern Pacific common stock which we held."

Mr. Hill says (I, 700):

"Q. In the formation of the Northern Securities Co. was there any agreement among its promoters or any of them, including yourself, by which they or any of them bound themselves to transfer their stock in either railway company to the Northern Securities Co. when it should be organized?

A. There was no agreement of any kind. When I discussed the matter with these gentlemen they said 'All right, go ahead; we will put ours in'—each man speaking for himself, and I think I saw them all separately with one exception. I saw Mr. Kennedy and Mr. James together; possibly I saw Mr. Thorne and Mr. Clark together; the others I saw separately. There was no agreement; an hour—a minute—before any particular shareholder of the Great Northern transferred his stock he was at liberty to turn around and go away with it."

And here it is to be noted that Mr. Hill, owning from 11 to 12 millions of Great Northern stock, retained and did not transfer to the Securities Co. between 2½ and 3 millions (I, 110), and at the time of his examination, still retained them as a matter of sentiment—of course considering that he had a right to do so (I, 114).

FORMATION, NATURE, POWERS AND PURPOSES OF SECURITIES CO.

(1) **Formation of the Securities Co. Railway Companies had nothing to do with Formation or Plan for forming it. Wholly the Work of Shareholders Acting in their own Interest as such, and in that of their Fellow Shareholders.**

(2) **Nature of the Securities Co. A Lawful Corporation. Not a Railway Company, and has no power whatever to build or oprate Railways. Stocks of the two Railway Companies not Consolidated. They remain wholly distinct. No Increase of Capitalization of Railway Companies.**

(3) **Securities Co. may sell all or any part of its shares in either Railway Company without selling any of its shares in the other. It is absolute owner of all shares held by it.**

(4) **It was not formed to restrain or monopolize Commerce or lesson Competition in any way.**

(5) **Its Formation had no Connection with the Retirement of the Northern Pacific Preferred Stock.**

(1) Mr. Hill, I, 698, 88.
Mr. Mellen, I, 172, 860.
Col. Clough, I, 784, 824-831.

(2) Col. Clough, I, 836-840.
Defts. Ex. 8 and 23; I, 977, 982, 1000, 1002.
Mr. Kennedy, I, 213.

(3) Mr. Morgan, I, 361.
Mr. Hill, I, 699.
Col. Clough, I, 788, 792.
(4) Mr. Kennedy, I, 216-7.
Mr. Perkins, I, 241-2.
Mr. Steele, I, 304-5.
Mr. Morgan, I, 362-3.
Mr. Hill, I, 695-696.

(1) The actual formation of the Securities Co., including the determination under the laws of what state it should be organized, and what its articles should contain, was in very few hands (Col. Clough, I, 824, 831).

Mr. Morgan says he "had nothing to do with it" (I, 351).

Mr. Hill further says (I, 88):

"The plan for organizing the Securities Co. was worked out and modified or changed between the 1st of September and the date of the publication of the Articles.

Q. Who finally decided upon the plan that was adopted in the organization of the Northern Securities Co.?

A. Practically, Mr. Kennedy, Mr. George Baker, Mr. James, Mr. Thorne, Mr. Clough, Mr. Perkins and myself.

Q. And were there no others than those whose names you have just given who had anything to do with the actual perfecting of the plan of organization of the Northern Securities Co.?

A. No one outside of the counsel who drew the papers. I think I had as much to do with it as anybody.

Q. Mr. Hill in the discussion and consummation of the plan which resulted in the organization of the Northern Securities Co., had J.

Pierpont Morgan or his partners anything to do with it?

A. Mr. Perkins was his partner. He had something to do, but in the first instance nothing, and at the last very little"

There was, however, no meeting of these gentlemen. Mr. Hill would see one and another of them as stated in a passage (I, 700) already quoted.

It was proposed to form a Minnesota corporation, if a suitable territorial charter could be found and acquired, and a considerable time was spent in the search for such a charter without finding one that was available (Col. Clough, I, 784-5; 817-9, 824; and see Mr. Morgan, I, 354: "We could not tell at that time if we were going to be able to get our charter").

An organization under the Minnesota general laws was not favored, because of the double liability imposed on shareholders by the state constitution, and the general unfriendly policy of that State towards corporations and their shareholders (Col. Clough, I, 784, 815, 858). There was nothing in the nature of the proposed company to make an incorporation in Minnesota or Wisconsin necessary, or even of more propriety than an incorporation elsewhere. An extremely small percentage, whether in number or amount, of its expected shareholders would be residents of either state. A charter was accordingly sought in another state, just as the citizens of Minnesota uniformly do when forming a corporation of any magnitude whether for manufacture, trade or other purposes. After examination of the

laws of West Virginia, New York and New Jersey, the latter state was selected, principally because its incorporation laws were of earlier date and had been more thoroughly construed than those of the other states (Col. Clough, I, 785, 787, 824-6, 830-1). It was left to Col. Clough to make the selection as between these states, and it was made by him (I, 828), and made only a few days before the actual incorporation, November 13, 1901 (Id. 831).

The formation of the Securities Co. was from the inception of the project to the complete organization of the company wholly the work of a few shareholders of the two railway companies, acting in their own interest and that of their fellow shareholders to protect that interest. While their action must necessarily benefit the two companies—especially their interests and their commerce arising from the Burlington purchase—it was still the action of the shareholders only, and of only a very small portion of the shareholders of each company. Neither railway company had anything to do with the formation of the Securities Co., or with the project of forming it, at any stage of that project or in any manner whatever.

> "Neither the Great Northern Co. nor any of its officers as such had anything whatever to do with it," (the formation of the Securities Co.) "not any more than the most distant railway corporation in the country. Absolutely nothing. The matter of forming the Northern Securities Co. was purely of the shareholders, and limited to a very small number. I think I am safe in saying not to exceed 11 out of 1800" (Mr. Hill, I, 698).

And the holdings of these 11 in Great Northern "was between 33 and 35 millions out of a capital of 125 millions." (Id.)

Mr. Hill says (I, 699) that he knows of no action taken by the Northern Pacific Co. or its officers in forming or organizing the Securities Co., and Mr. Mellen, president of the Northern Pacific Co., says that none was taken (I, 860), and that he had nothing to do with it (I, 172).

(2) The nature and purposes of the Securities Co. are those and those only set forth in its Articles of Incorporation, which are an exhibit to the petition. There can be no doubt but that it is a lawful corporation under the laws of New Jersey, nor is the lawfulness of its creation and existence questioned in the petition. It is not a railway company, has no power to operate railways or carry on transportation of any kind, either local or interstate.

The petition, it is true, charges (in par. XI) that the company "was not organized in good faith," but was organized "to incorporate the pooling of the stocks"—whatever that may mean, and to act a grotesque combination of parts in respect of the stocks. And that it "never had any capital sufficient to warrant such stupendous operation," which may possibly be true, for it is not clear how any amount of capital would enable the company to be at one and the same time what the petition says it is, viz: "a mere depositary, custodian, holder and trustee," of the same stock; and all this when, as stated in

paragraph VI, it is also the absolute owner of that stock.

Its ownership of shares of the two railway companies no more consolidates, or pools, or merges those shares, or the two companies, or their property, than the ownership of two pieces of real estate by the same person consolidates them or the title to them. The shares of the railway companies owned by the Securities Co. remain as separate and distinct from each other as would 100 shares of each company held by an individual.

This whole matter of capitalization of this state corporation is a subject outside of the regulative power of Congress under the Commerce clause, and is of course not covered by the Anti-trust act. The cry of stock-watering may always be relied on to excite prejudice against a corporation—except before a tribunal where prejudices are unknown—but has no bearing on the case.

Paragraph XI of the bill charges that the capital of the Securities Co. exceeds by $122,000,000 the combined capital of the Great Northern and the Northern Pacific Companies. And in the cross-examination of Col. Clough (I, 836-9) the claim is made that this is an "increase in an indirect way of the capitalization of the constituent companies" (836). Of course, as counsel should have known, there are no "constituent" companies. And there is no more increase of capitalization than if the several shareholders of the Great Northern Co. should carry their shares on their books at $180 or even at the market value of $200, or should sell them at either

of those prices. That the capital of a corporation is increased by the amount of the aggregate premiums on a sale of all its shares is a discovery in finance. It is quite of a piece with the notion produced in the same cross-examination (839-840) that the Great Northern capital was watered because it had been largely increased within a few years, and this when the proof shows that the shares were selling at from $190 to $200 in a market somewhat noted for "squeezing out the water" (I, 986; Defts'. Ex. 17). And the testimony is that every dollar of added stock represents a dollar added to the property of the company (Col. Clough, I, 836-840, 977-986; Defts'. Ex. 8, I, 977).

The fact is that this over-capitalization and stock-watering charge is simply another of the errors due to the misinformation furnished the Attorney General by the instigators of this litigation, and by which he has been misled into bringing this suit. The following is a statement of the mileage and capitalization of the Great Northern and Northern Pacific systems on June 30, 1901, as it appears in the record, except that in this statement the full amount of authorized Great Northern shares ($125,000,000) is given, instead of the amount then issued and outstanding ($98,711,750).

	Mileage	Stock	Bonds	Total Capitalization
Northern Pacific (II, 1000, 1002)	5100.14	155,000,000	177,925,789	332,925,789
Great Northern (II, 977, 982)	5429.18	125,000,000	97,138,054	222,138,054

There is no claim or pretence that the Northern

Pacific is over-capitalized, and the charge against the Great Northern Co. is so baseless that the Attorney General could never have made it had he not been grossly misinformed.

(3) The Securities Co. does not hold its railway shares as trustee, but as absolute owner. This is positively stated by Mr. Kennedy, I, 213; Mr. Morgan. I, 361; Mr. Hill, I, 699; Col. Clough, I, 788, 792, and is alleged as positively and directly in paragraphs VI and VIII of the petition, though in paragraph XI the Securities Co. is put into the before-mentioned inconsistent and incongrous positions of "depositary, custodian, holder and trustee" of the same shares—as trustee, with the legal title, and custodian, with no title at all.

And the decision seems to halt between the statement in one place that the Securities Co. is the owner of the shares it has acquired, and the statement in another that it is a mere fictitious personage, and that the shares have merely been placed in its name by the real owners. Compare II, 1704-5 with II, 1706-7, 1708, and see pages 12, 13, 17, supra.

Being absolute owner of the shares it has acquired, the Securities Co. is free to sell (and, indeed, as Mr. Hill says—I, 699—"to burn") all or any of its shares of either railway company without selling any of its shares of the other. And the same absolute ownership and consequent absolute power of sale was of the essence of the original project of a company to hold only Great Northern stock (Col. Clough, I, 811).

How can shares which are thus owned and may be thus dealt with be said to be consolidated, or merged, or amalgamated or pooled? And if the shares are not, certainly the corporations are not, nor are their railroads consolidated or merged, either "practically" as charged in the petition and contended for in the cross-examination of Col. Clough (I, 806), or theoretically, or in any other way.

(4) The affirmative evidence of the purpose and the only purpose for which the Securities Co. was formed is conclusive that it was to enlarge and not to restrain or monopolize interstate and foreign commerce. The evidence introduced by the Government as well as that introduced by the defendants contains also categorical denials of the charge in the petition that the Securities Co. was the outcome of a combination and conspiracy to restrain and monopolize the competitive interstate and foreign commerce of the two roads. No such thing was even thought of by any one concerned in it.

Mr. Kennedy, I, 216-7.
Mr. Perkins, I, 241-2.
Mr. Steele, I, 304-5.
Mr. Morgan, I, 362-3.
Mr. Hill, I, 695-6.

(5) It is one of the many immaterial charges brought against the Securities Co. in this suit and its precurser the Peter Power suit, that the formation

of that company and the retirement of the Northern Pacific preferred stock were parts of one scheme with two objects, viz: to defraud the preferred stockholders, according to Peter Power, and to restrain interstate commerce, according to counsel for the Government.

The one ground for this fanciful charge is the fact that the filing of the Articles of the Securities Co., and the passage of a resolution by the Northern Pacific directors for retiring the preferred stock, took place on the same day, November 13, 1901.

It is safe to say that if the conspiracy had embraced those two objects, the conspirators would have taken especial care to avoid, and would have avoided, this coincidence.

The retirement of the preferred stock had been determined on long before the Securities Co. was thought of. As already stated, it was thought to defer it for action by a board of directors not chosen by the voting trust (*Supra*, pp. 29-30). That board was chosen at the stockholders' meeting in October. There was no directors' meeting in that month for want of a quorum (Mr. Kennedy, I, 218), hence the first meeting of the new board was held November 13. The stock must be retired, if at all, on January 1st of some year. To retire it required the payment of $75,000,000. The interval between November 13th and January 1st was short enough for carrying out plans for raising this sum, and also for giving notice to the preferred stockholders. And so if action were to be taken, it had to be taken at this meeting, and this was accordingly done (Mr. Steele,

I, 306; Mr. Morgan, I. 323-327; Minutes of Northern Pacific Directors' Meeting, I, 586).

On the other hand, the completion of the Securities Co.'s Articles was delayed by absence of some of the gentlemen concerned, so as to put off the filing of them until November 13th (Col. Clough, I, 786-7).

SECURITIES CO.'S PURCHASES AND HOLDINGS OF STOCK—IT IS NOT CONTROLLED BY THE "CONSPIRATORS."

(1) Aquisitions of the Securities Co. Its Purchase of Shares. Transfer by Shareholders of each Railway Company were made Separately and Individually and not in Concert with Each Other.

(2) The Purchase of the "Harriman Shares"

(3) Control of Northern Securities Co. Mr. Hill and his Associates and Mr. Morgan and his Associates, all the "Conspirators" together, do not hold one-third of the outstanding Shares of the Company.

(4) The Securities Co.'s Holdings of Shares of other Corporations than the two Railway Companies.

(1) Mr. Kennedy, I, 213-4, 215-6.
Mr. Steele, I, 297-8, 303.
Mr. Morgan, I, 363.
Col. Clough, I, 788, 792.

(2) Mr. Hill, I, 91-98.
Mr. Perkins, I, 228-235, 240.
Mr. Schiff, I, 267-8.
Mr. Steele, I, 291-3, 297, 301-3.
Mr. Morgan, I, 357-8, 362.
Mr. Harriman, I, 899-909.
Minutes of Securities Co., Directors Meeting, I, 910.
Col. Clough, I, 914-6.

(3) Mr. Hill, I, 120-2, 123-4, 129-130.

(1) Soon after its organization the Securites Co. began the acquisition of shares of the two railway companies, at the valuations already mentioned of $180 for Great Northern and $115 for Northern Pacific, at which Mr. Morgan thought the shareholders of the latter had rather the best of it. (I, 354). On November 22, 1901, the company issued a circular to the Great Northern shareholders, (I, 701,) announcing its readiness for sixty days to accept offers of their shares at $180, payable in Securities stock at par, a price considerably less than the market price of this stock at that time, which was between 187 and 195. (Mr. Hill, I, 692.) This was in accord with the purpose that had existed almost from the outset, and resulted in various letters and personal applications by Great Northern shareholders to Mr. Hill for information and advice. (Mr. Hill, I, 702; Col. Clough, I, 832). Being about to leave New York, he prepared a form of letter to meet such inquiries as might be made in his absence, and to be sent "only in answer to communications," and "not to people that you (I) had not received inquiries from." (I, 703.) This letter (I, 704-5), dated November 30, 1901, notwithstanding the evidence given by counsel for the Government, (I, 833,) contains nothing in the way of solicitation or even advice, nor did the company, by its circular of November 22, or in any other way, make any such solicitation. (Col. Clough, I, 834; Mr. Morgan, I, 363).

Great Northern shareholders resorted to Mr. Hill for his opinion as to whether it would be for their

interest to exchange their stock, just as they had doubtless often resorted to him for his opinion as to whether the stock was a good purchase at the market price, or whether they had better take their proportion of a new issue of shares, or sell their rights. And Mr. Hill answered these new inquiries about exchange of stock, just as he had many times answered inquiries such as have just been suggested —and for the same reason and no other.

The circular and draft of letter are as follows (I, 701, 703):

"27-29 Pine Street, New York City,

November 22, 1901.

"TO HOLDERS OF STOCK OF THE GREAT NORTHERN RAILWAY COMPANY:

"The Northern Securites Company, incorporated under the laws of the state of New Jersey, with an authorized capital stock of $400,000,000, and with power to invest in and hold the securites of other companies, has commenced business, and has acquired from several large holders of stock of the Great Northern Railway Company a considerable amount of that stock.

"A uniform price has been paid of $180 per share, in the fully paid stock of this company, at par. This company is ready to purchase additional shares of the same stock at the same price, payable in the same manner, and will accept offers made on that basis if made within the next sixty days.

"Offers for sale of stock of the Great Northern Railway Company should be made upon the enclosed form, and should be accompanied by the certificates of the stock offered with transfers duly executed, having United States stamps for transfer tax of two cents per share affixed.

"Upon receipt of any such offer, so accom-

panied, the Northern Securites Company will deliver to the seller of the stock of the Great Northern Railway Company, certificates of its own stock to the amount of the purchase price above named, or, if such certificates are not ready for delivery, its negotiable receipt obliging it to issue and deliver such certificates as soon as ready. For fractional parts of shares scrip certificates, convertible into stock in multiples of $100, will be given.

"NORTHERN SECURITIES COMPANY,
By James J. Hill,
President."

November 30th, 1901.

"Dear Sir:

"Replying to your letter of the 23rd instant, asking for further information about the Northern Securities Company, I beg to say that the business of that company is to deal in high-class securities, to hold the same for the benefit of its shareholders, and to do such other acts as will advance the interests of the companies whose securities it holds.

"The powers of the company do not include the operation of railways, banking, nor buying or selling for others on commission.

"The organization of such a company has been considered for many years by the original promoters of the St. Paul, Minneapolis & Manitoba Railway Cmpany, and its successor, the Great Northern Railway Company, who have always remained the largest shareholders therein. These men have deemed it wise to make permanent arrangements for the protection of their interests and for securing a continuous policy in the management of their properties. Believing the Northern Securites Company will secure the objects named, they have generally sold to it their holdings of Great Northern shares, on the terms stated in the circular.

"The traffic of coal and other local companies is of great value to the railway, while the conduct of the business of such companies is out-

side of the railway's corporate powers. The Securities Company will control this large traffic for the railway and will receive the profits of these separate properties.

"The offer contained in the circular came from the request of the large holders of Great Northern, above mentioned, who desired that all other holders might have the same opportunities as themselves in association with them, and upon the same terms. The writer is of opinion that the offer of the Securities Company is one that Great Northern shareholders can accept with profit and advantage to themselves.

"Yours truly,
(Signed) JAS. J. HILL."

It will be noticed that in neither the circular nor the letter is there any designation of any railway shares as acquired or likely to be acquired by the Securities Co. other than those of the Great Northern Co. There is not even an intimation that any Northern Pacific shares have been or will or may be obtained.

It does not appear that a single Great Northern shareholder, outside of Mr. Hill's immediate associates holding about 33 millions, transferred his shares to the Securities Co. with any knowledge or notice that the Securities Co. had acquired or contemplated acquiring any shares whatever of the Northern Pacific Co., or with any knowledge of the conspiracy charged in the petition.

And it does not appear how many Great Northern Shareholders received this letter of Mr. Hill, nor how many of those who did receive it transferred their shares to the Securities Co.

In October, 1902, the Securities Co. had acquired 95 millions of Great Northern stock, for which it

had issued its own shares to the amount of 171 millions. (Col. Clough, I, 839).

It had also acquired about 150 millions of Northern Pacific common stock, including the 37 millions of the Harriman stock and the new common stock issued in place of the retired preferred stock. And the total stock outstanding was about 350 millions.

The transfers of shares in each company were made by the share-owners individually, each for himself, without any agreement or concerted action, and in each case they were absolute, without any condition as to title or use, or any agreement as to the use or disposition of the shares of the Securities Co. received in exchange.

On these points the testimony (most of it introduced by the Government) is conclusive.

J. P. Morgan & Co's. shares were the subject of some negotiating before they were turned in. (Mr. Hill, I, 143; Mr. Steele, I, 297, 303).

Mr. Kennedy says (I, 213):

> "I sold it" (my stock) "absolutely to the Northern Securities Co." (I have) "no control over the stock. I have over the Northern Securities Co. stock, of course, but not over the stock that I sold them."
>
> (I, 214) Q. The stock that you received from the Northern Securities Co. you own yourself?
>
> A. Individually; yes.
>
> Q. Have you had any agreement or arrangement as to how you shall vote or handle that?
>
> A. None whatever. Never heard such a thing suggested.
>
> Q. Was there ever any agreement, so far as you know, between the stockholders of the

Northern Securities Co. that any set of men, so far as you know, were to control the Northern Securities Co.?

A. I never heard of such a thing.

Q. Or any control over it other than comes through a majority of the ownership of the stock?

A. That is the only way. Each man owns his own stock, and can do as he likes with it.

Q. Did you know of any agreement between the majority stockholders of the Northern Pacific Co. that they would all turn their stock in or sell it to the Northern Securities Co.?

(I, 216): A. I know of no such agreement; never heard of it.

Q. So far as you know, did or did not the stockholders act individually as they saw fit?

A. They all acted individually.

Q. In selling their stock to the Northern Securities Co.?

A. Certainly. I did, I know, and I suppose all the others did the same.

Mr. Steele says, (I, 303):

Q. In dealing with the Northern Securities Co. for the sale of stock, did the Northern Pacific stockholders act separately or in a body?

A. As to that I can only state what I think I have already testified to" (I, 297-8) "that my firm made the negotiations as to the price at which the stock which we had should be sold to the Northern Securities Co.; and it was understood that our friends, by which I intend to mean the same persons that I tried to describe to Mr. Boutelle, were to have the right to put their stock in at the same figure. There was no binding agreement on our part that they should, and we had no authority to obligate them to do so. It was a matter for individual determination by each Northern Pacific stockholder, and extended only to those whom I have included as our friends, constituting in amount about 41 or 42 millions."

Mr. Morgan confirms Mr. Steele (I, 363):

Mr. Hill says, (I, 700):

> Q. In the purchases made by the Northern Securities Co. from the Great Northern stockholders, state whether or not such purchases have been the result of any agreement among several stockholders, or whether they were separate transactions with each shareholder who sold his stock?
>
> A. Each sale covered nothing but the sale of that particular stock. Each shareholder acted for himself at all times. * * *
>
> Q. Now, was there any solicitation with the shareholders of the Great Northern either on the part of the officers of the Great Northern or of the officers of the Northern Securities Co. —any solicitation to them to turn in, to transfer, their shares to the Northern Securities Co.?
>
> A. No, sir, *there was absolutely none.* On the contrary *great pains were taken to see that every shareholder understood that it was a matter for himself to decide and one that nobody else could decide for him.* The price was such, being below the market, that it was thought it would deter a number from selling their stock. In fact, I did not expect that so large a number of the shareholders would exchange their stock. We gave them the opportunity if they desired it."

And see I, 704-6, for Mr. Hill's cross examination on this point and on his form of letter to inquiring shareholders.

Col. Clough, vice-president of the Securities Co. and in general charge of its New York office, being questioned (I, 787) as to his knowledge of the transfers of Great Northern and Northern Pacific shares to the Securities Co., and having answered that he had knowledge and that "it was all done

under my supervision" testifies as follows, (I, 788):

> Q. Now, state whether the transefers were individual, absolute without reservation, and without solicitation from the Northern Securities Co.—fully.
>
> A. To answer the first question: Every purchase of stock that has been made by the Northern Securities Co. (whatever stock it may be) has been made by direct individual transactions and negotiations with the owner, except in the one instance I have referred to in my previous testimony of the purchase of the Harriman and Pierce stock, where J. P. Morgan & Co. negotiated the purchase, and the purchase was assigned to the Northern Securities Co.
>
> Q. Now, were the transfers absolute?
>
> A. They were absolute and unconditional in every case.
>
> Q. Were they solicited by the Northern Securities Co.?
>
> A. *No, sir; in no case.*

Col. Clough goes on to speak of the circular of November 22, 1901; of the many shareholders who brought in their stock personally, and of the information given them, especially after the bringing of suits against the company had been begun.

There is nothing in the record to contradict or qualify this and the other evidence on this point. Yet the Circuit Court, having found that the promoters of the Securities Co. agreed with each other to use their influence to induce other shareholders in the two railway companies to transfer their shares to the Securities Co. (see page 68, supra) has also found (II, 1705) that—

"The Securities Co. was enabled to make the subsequent purchases of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Co., by the advice, procurement and persuasion of those stockholders of the Great Northern Co. who had been instrumental in organizing the Securities Co. and had exchanged their own stock for stock in that company shortly after its organization."

(2) The Purchase of the "Harriman Shares."—Shortly after its organization, the Securities Co. became the purchaser of the Northern Pacific common and preferred shares (amounting together to about 78 millions) which had been bought by the Oregon Short Line Co., and stood in the name of Mr. Harriman and Mr. Pierce. Much space is devoted in the testimony for the government to the preliminaries of this purchase, but the facts may be briefly stated:

When the Oregon Short Line Co. realized that the Northern Pacific Board of Directors who had been chosen in October, 1901, (and who, according to agreement, had been named by Mr. Morgan) would in all probability take proceedings to retire the preferred stock, and thus make the Oregon Co. a minority shareholder, negotiations were opened with J. P. Morgan & Co. for a sale of these shares (Harriman, I, 901-2, 903-4). The negotiations were protracted. Mr. Harriman, who acted for the Oregon Co., seems to have waited till the Northern Pacific directors, on November 13, 1901, had voted to retire the stock on the first day of January then next,

before closing the bargain (I, 907). It was toward the end of the negotiations and but a few days before they were closed, that it was proposed to make part-payment in stock of a company which proposed to take Great Northern shares at $180 and Northern Pacific at $115, payable in its own shares at par (I, 901, 902-7).

Mr. Harriman first learned that the stock was to be delivered to the Securities Co. when it was in fact delivered.

> "The first I knew was when it was delivered to that company" (I, 902).
>
> "There never was anything on their part, it seems to me, that would lead me to infer that they were to turn that stock over to a holding company. Towards the end when the matter crystalized, and when we were very nearly at the end of our tether, they offered to pay for these shares in the stock of a holding company so much, and so much in cash. Now, there was nothing said as to whether they would turn this stock over to a holding company, or whether they would hold it themselves; but they would give us that holding company's stock in part-payment" (I, 901).

He dealt with J. P. Morgan & Co., as principals. They did not claim to be acting for others (I, 900, 901, 902). He had nothing to do with forming the Securities Co. and made no investigations, but relied on the statements of J. P. Morgan & Co. and the reputation of the men engaged in forming the company (I, 907).

Mr. Perkins, who acted for his firm in negotiating the purchase, says the terms were agreed on about November 18, 1901, and that J. P. Morgan & Co.

then sold the shares or assigned their purchase to the Securities Co. (I, 240, and see Mr. Morgan, I, 357; Schiff, I, 267; and Col. Clough, I, 788). The purchase was not at so much per share, but for a round sum. And when the shares came to be delivered to the Securities Co., they proved to be less than had been supposed, and the Securities Co. refused to take them at the price, but did take them after a substantial reduction of the price (I, 240; Mr. Steele, I, 302). The shares actually delivered amounted to $37,023,000 of common stock, and $41,085.000 of the preferred stock. The reduced price paid was the round sum of $91,407,500, payable $82,491,871 in shares of the Securities Co. and $8,915,629 in cash (I, 910 as explained by Col. Clough, I, 914-6).

An examination of the citations from the record at the head of this statement of the Harriman purchase, will supply matters of detail necessarily omitted here. There is some discrepancy among the witnesses in the matter of dates, but they agree that J. P. Morgan & Co. acted for themselves, and that they closed the bargain with Mr. Harriman after the organization of the Securities Co., (and see Mr. Steele, I, 302-3,) and afterwards assigned to the Securities Co.

Mr. Hill took no part in the negotiations, and knows only that there were negotiations and that the sale was made (I, 92, 94, 96).

Mr. Steele (I, 303) testifies that there was no connection whatever between the organization of the Securities Co. and the acquisition of the Harriman

stock. And Mr. Morgan says (I, 362):

> Q. Was it agreed by any one, so far as you know, before the Northern Securities Co. was organized that the so-called Harriman or Union Pacific stocks in the Northern Pacific should be placed in the Northern Securities Co.?
>
> A. No, we did not require it.
>
> Q. And you did not know that it would be done until after the consummation?
>
> A. Not until after.

Mr. Hill was asked (I, 99) if there was any connection between the organization of the Securities Co. and the purchase of the Harriman stock, and is emphatic in his denial of any connection whatsoever between them.

And Mr. Morgan's testimony (I, 357, at bottom) shows that he considered his firm had bought the Harriman stock and might have kept it if they so desired, instead of selling to the Securities Co.

(3) The petition, while it charges Messrs. Hill and Morgan and their friends with conspiring to restrain and monopolize commerce by placing the control of the two railway companies (then possessed, as it says, by themselves) in the hands of the Securities Co., wisely refrains from charging them with doing this in their own interest or for their own benefit. The evidence shows that whereas before the formation of the Securities Co. they possessed a majority of Northern Pacific common stock, with the right to acquire a majority of all the stock in the retirement of the preferred stock and issue of an equivalent

amount of new common stock, (see page *supra*), and somewhere near 39 per cent of Great Northern, their conspiracy has, up to the present time, cost them the control of the Northern Pacific, and they have not gained control of either the Great Northern Co. or the Securities Co. Whatever Northern Pacific or Great Northern stock they may still retain must be far less than enough to give any sort of control; and the more of such stock they retain, the less stock have they in the Securities Co. But even if they had transferred to the Securities Co. all their 33 millions of Great Northern, (less Mr. Hill's 2½ to 3 millions, retained by him) and all their 41 to 42 millions of Northern Pacific Common, and all the new common stock which the holders of the 42 millions would be entitled to obtain (75/80 of their holding,) they would still hold only about 140 millions of Securities Co. stock, out of a total of 400 millions, of which 350 to 360 millions have been issued. (Col. Clough, I, 254; Mr. Hill, I, 713). And none of them has any stock left in either railway company, except Mr. Hill, who has a little over two per cent of Great Northern—hardly a "controlling interest."

If their aim was to restrain or monopolize commerce, it was not to do either for themselves, but to surpass all the classic instances of "*Sic vos non vobis.*"

And hence the statement in the decision (II, 1709) that "a few men acting in concert and in the name and under cover of its charter" are given "the power to control all the means of transportation of" the two railway companies, and the statement (II, 1710)

that "the object and necessary effect" of the combination in hand "is to give to a single person or to a coterie of persons full control of all means of transportation," etc., are without foundation. They lay out of account the 1300 shareholders who have not conspired, and who hold the great majority of the stock; for the word "coterie" would hardly include them, and "a few men" certainly would not. Mr. Morgan says, (I, 356) in testimony offered by the Government:

> "There is no interest that I know of to-day that can control the Northern Securities Company."

Even without the plenary proof of what *was* the purpose of the men who promoted the Securities Co., the bare statement of their holdings in that company is alone enough to show that it was not to gain control of both railway companies, whether for the purpose of restraining or monopolizing commerce or committing any other crime. They knew that the result of their plan would not be to give them additional control, but would take from them the control they already had of one (and one only) of the companies, and take away whatever power they already had of violating the Anti-trust Act in respect of the commerce of either of them.

RESULTS OF FORMATION OF SECURITIES CO.

(1) Commerce has not been Monopolized or Restrained. Each Railway is managed and required by law to be Managed by a wholly Different Board of Directors from that of the other. Each is operated as independently and competes as much with the other as before the Securities Co, was formed.

(2) Amount and Percentage of the Interstate Commerce of Each Railway on which competition could be lessened or Rates Controlled even by a full Consolidation of the two Companies and the Absolute Ownership of both Lines by a Single Company. Such Amount is less than 3 per cent of the total Interstate Commerce of Each—Competing Rates between same points necessarily the same on both Lines, however Independent of Each other.

(3) Increase of Traffic from Burlington Purchase necessarily brings reduction of rates along the whole line of each Company. Reduction already made.

(4) No Evidence of a Purpose on the Part of the Securities Co. or either Railway Co. to restrain or Monopolize Commerce or to combine or conspire for that purpose.

(1) Mr. Mellen, I, 175-8, 179.
Mr. Morgan, I, 320, 322.
Mr. Hill, I, 697.
Col. Clough, I, 843-5.
Gen. St. Minn. 1894.
(2) Defts. Ex. 6 and 7, Vol. I, 969-976.
Mr. Hill, I, 697, 714.
Col. Clough, I, 802-3.
Mr. Commissioner Prouty, I. 642.
(3) Mr. Hill, I, 683-4, 730-1).

(1) The formation of the Securities Co. has not resulted in any monopoly or restraint of commerce or suppression of competition.

The management of each railway company is solely in its board of directors, and its commerce is carried on by the board and by the officers and servants appointed by the board. The Securities Co. can at most elect a board of directors for each company. And these boards must be distinct from each other. No person can be a member of both boards, nor can the same person be an officer of both companies. The Great Northern charter provides (I, 441,) that

> "'All the affairs and business of the said company shall be conducted by or under the direction of the board of directors and they are authorized for the purposes specified in this act to make and establish regulations and by-laws, and to do all things necessary to be done, and not inconsistent with the constitution and laws of the United States, or the laws of this territory, or this act."

The same section provides that the first directors chosen shall be divided by lot into three classes, to hold office respectively for one, two and three years;

and the directors elected in each year thereafter "shall hold their offices three years and until their successors shall be elected and enter upon their duties." (I, 441). And this classification and term of office is shown in the list of directors in the 12th and 13th annual reports of the company. (I, 465, 921, 923).

The Northern Pacific charter provides as follows (I, 425):

> "Section 9. All of the affairs of said company shall be managed by a board of directors, who shall be stockholders, and who are hereby invested with all the powers of the corporation save as hereinafter provided. They shall be chosen annually by ballot by the stockholders at the annual meeting of the company" * * *

The evidence, introduced by the Government, of Mr. Mellen and others as to the management of the two railways since the formation of the Securities Co. is as follows (I, 175-8):

> "Q. Mr. Mellen, is there any difference in the management of the Northern Pacific road before and the management since the organization of the Northern Securities Company?
>
> A. None whatever. * * *
>
> Q. Speaking about competition, Mr. Mellen. Now, take between the head of the lakes and Minneapolis and St. Paul, the rates of the Great Northern and the Northern Pacific are the same, are they not?
>
> A. Yes.
>
> Q. Must be the same?
>
> A. Yes. * * *
>
> Q. You said there was active competition. Do you mean by that each road is struggling to get all the business it can?
>
> A. Yes.

Q. And that competition is active to-day, is it?

A. Yes, sir.

Q. Now, is it possible in railroad management for the rates between the same points to be different over one line from another line between the same points?

A. Yes; if you want the business all to go by the line with the lowest rate.

Q. If each company does business, the rates have to be the same?

A. Substantially the same.

Q. As between all competing points between the Northern Pacific and the Great Northern the rates are the same, are they not?

A. They are.

Q. And have always been the same since you have been there?

A. So far as I know.

Q. Then you mean by competition each line is struggling by soliciting business and getting business to get all it can?

A. Yes; offering superior facilities and bringing pressure to bear and influence personal and otherwise, and every way you can.

Q. Do you mean to say that the conditions that you have just testified to were due to business conditions, to natural conditions, or to agreements and understandings reached between traffic managers and officials of the lines?

A. Both.

Q. Well, isn't the main factor in the conditions you have testified to the fact that the roads, for the purpose of preventing competition, have made a tacit agreement to maintain certain rates?

A. No.

Q. That is not the fact?

A. No.

(I, 178):

Q. Are not the rates, and have they not been for a number of years between the Northern Pa-

cific and the Great Northern, understood between those companies and maintained to a certain given point?

A. The rates between the Northern Pacific and Great Northern are frequently misunderstood, I am very sorry to say, to the detriment of both companies and the public, and I find no difference in the conditions to-day from what I found when I came here, and I don't expect there will be any difference in the conditions if I should stay here for ten years to come. * * *

(I, 179):

Q. The rates, of course, have to be published?

A. Yes.

Q. And you have to publish those rates a certain time before they go into effect under the law?

A. Yes.

Q. Do you know of any way that the Great Northern can have a published tariff or have a rate that is less than the Northern Pacific between two common points and the Northern Pacific get any business?

A. No. I don't know how it can be done.

Q. Isn't it a positive necessity that makes rates between the same termini of competing railroads the same? Isn't it a positive necessity?

A. Yes.

And in the examination of Mr. Harriman by the Interstate Commerce Commission, put in evidence by the Government, Commissioner Prouty thus expresses what is a truism in railway transportation, (I, 642):

"You know, Mr. Harriman, that *competing rates* have to be practically the same between the same points."

Mr. Morgan says (I, 320) that up to the date of his testifying (March 26, 1902) the Northern Pacific Co. has been conducted as an independent organization.

Mr. Hill, testifying for defendants, says (I, 697):

> Q. Has anything been done between the two companies for the purpose of reducing competition at any point?
>
> A. Nothing whatever. I think the competition is just as free and full as it has been at any time in the past 20 years.
>
> Q. So that, as far as you know, Mr. Hill, is either road operated less independently of the other since the formation of the Northern Securities Co. than it was before?
>
> A. If there is any difference, I think they are a little more independent of each other. (And he goes on and gives an instance of this).

As to the status of the board of each company as independent of the shareholders during its term of office, and the statutory requirement of separate officers for each company, see Col. Clough, I, 841-3.

(2) The amount or percentage of the interstate commerce that could be affected even if the Securities Co. had control of the operations of the two companies—had as complete control as the Burlington would have should it obtain a 99 year lease of both the Great Northern and Northern Pacific, or as the New York Central has of the West Shore by virtue of a perpetual lease (besides ownership of all the stock)—is very small. Mr. Hill in his testimony (I, 697, 714) puts it as under 10 per cent; but

it is much less than 10 per cent. It does not exceed 3 per cent of the interstate commerce of the two companies. This is fully shown in Defendants' Exhibits 6 and 7, (I, 969-976), which are explained by Col. Clough (I, 802-3, 874-8, 853-7).

The following table, a combination of those in I, 969 and 973, shows the percentage of the competitive and noncompetitive interstate commerce on each line.

	G. N. per cent.		N. P. per cent.	
1. Traffic, the rates on which could be controlled by joint action of the two companies alone ..	2.78		2.89	
2. Traffic the rates on which could be controlled by the two companies and connecting lines,but not by the two companies alone	.65	3.43	4.90	7.79
3. Traffic which is in competition with other lines, and the rates on which could not be controlled by the two companies alone	6.89		2.58	
4. Traffic the rates on which could be made only by agreement with connecting carriers, and which is also in competition with other carriers, so that the rates on it could not				

be controlled by the two companies alone, or by them and connecting carriers	17.09	23.98	13.25	15.83
5. Traffic on either line between points not reached by the other, and so non-competitive	72.59		76.38	

The rates on any class of traffic, except class 1, can not be controlled merely by control of the two companies. Those in class 2 (joint rates) can be made only by assent of connecting carriers. Those on class 3 are subject to the competition of other carriers. Those on class 4 (joint rates) require assent of connecting carriers and are also subject to the competition of other carriers. Those on class 5 are non-competitive, and subject to the sole control of each company to the exclusion of the other.

It is therefore evident that the only interstate competitive traffic which the control of the two railways could give power to restrain or monopolize by suppressing competition is that in class 1, being 2.78 per cent of the total interstate and foreign commerce of the Great Northern Co. and 2.89 per cent of that of the Northern Pacific Co.

From this table, with the statement in the same exhibits of the amount of the gross earnings in each of these five classes of commerce, it appears that, In the year ending June 30, 1901, from class 1 the Great Northern earned (I, 972) $471,218.88, and the Northern Pacific (I, 976) $554,395.24, making a

total of $1,025,614.12 for both roads. Deducting the operating expenses—51 per cent on the Northern Pacific (I, 998) and 55 per cent on the Great Northern (I, 484) and the net earnings from the traffic in question were:

Great Northern	$212,048.49
Northern Pacific	282,741.57
	$494,790.60

These were at the rates prevailing before any "monopoly."

Assuming that the monopoly brings about an increase of ten per cent in rates on this class of traffic, (and an increase no greater by the trunk lines, the wages of labor and everything used by the railways having risen from 25 to 150 per cent, has recently brought the Interstate Commerce Commission down upon them,) and that the advance of rates would not (though it presumably would) bring about a diminution of traffic, then the increase of the net earnings of the two companies as a result of the "monopoly" would be $49,479.

The amount actually earned by each company is of course mingled with its other funds, and from the aggregate its dividends are declared and paid. Assuming that the Securities Co. owned (as it does not) all the shares of both railway companies, it would receive from them, separately, dividends the aggregate amount of which would be increased by this sum of $49,479.

Of this Messrs. Hill and Morgan and their associates, if they owned as much as 140 millions of Securities Co. stock, would receive $19,791, if only 350

millions of the Securities stock were issued. If the whole 400 millions were issued, they would receive $17,317.

And when either of these sums is divided up among Mr. Morgan and Mr. Hill and their associates, the addition to his annual income which each of these gentlemen would receive would hardly seem to justify their labor and outlays, to say nothing of their abandoning control of the Northern Pacific Co. and incurring the heavy penalties of a criminal conspiracy.

This proof furnishes an additional corroboration of what needed no such aid—the direct testimony of the alleged conspirators as to their real motives and objects. And whether by itself, or in connection with the proof showing that the alleged conspiracy to control the two companies was (if a conspiracy at all) a conspiracy to abandon control of one of them and make it more difficult to gain control of the other, it amounts to a demonstration of the absurdity of the charge of conspiracy on which alone the petition is founded.

(3) Mr. Hill (I, 683-4, 730) speaks of the increase of traffic and reduction of rates since the Burlington purchase and since the organization of the Securities Co., and says that the reduction already made amounts to about 10 per cent, reducing the gross earnings by that amount. That the reduction of rates was made possible by the increased earnings and that the increased earnings were large-

ly due to the Burlington purchase. And see I, 682, 736, (already quoted) as to the increase of traffic. And see the Great Northern Annual reports for the years ending June 30, 1901 and 1902, respectively, (I, 483, I, 921, 944) the first showing gross earnings of $28,350,689.06 and the second showing $36,032,256.06. That this is not owing wholly to good times is apparent on comparing the earnings of 1900-1 with those of 1899-1900, also given at I, 483, and which were $28,910,789.26.

So that up to October of last year the formation of the Securities Co. had neither restrained the commerce (domestic, or interstate or foreign) of the Great Northern Co. or raised rates. On the contrary commerce has increased and rates have as a consequence been reduced.

And what is true of the Great Northern is also true of the Northern Pacific. See the Reports I, 998, 1004.

(4) There is absolutely no evidence whatever, direct, circumstantial or even presumptive, that the Securities Co., or either railway company, or any body connected with either of the three companies has now or has ever had or ever will have any purpose of restraining or monopolizing any part of the interstate or foreign commerce of the two railways or of either of them, or of engaging in any contract, conspiracy or combination to that end, or of doing anything to impair the absolute independence of the management of the railways and the free com-

petition between them which the evidence shows has not been in anywise changed by the stock acquisitions of the Securities Co.

The Government's case must rest on the assumption that such stock holding by the Securities Co. *necessarily* destroys that independence and freedom, and necessarily imposes restraint and creates monopoly. But that can hardly be called a *necessary* result which the evidence shows has not resulted at all.

And while the Circuit Court was wrong, as we claim, in its law when it held the power to restrain commerce to be the same thing in law as actual restraint, the decision whether wrong or right, has no application to the facts of this case, for the Securities Co. has no power to restrain the commerce of either railway company.

SPECIFICATION OF ERRORS.

First. The Court erred in finding and deciding that in the summer of 1901 certain large and influential stockholders of the defendant railway companies conceived the design of placing a very large majority of the stock of both said companies in the hands of a single owner. And erred in finding and deciding that the stockholders thus described had practical control of the roads of the two defendant railway companies.

Second. The Court erred in finding and deciding that said above described shareholders arranged and agreed with each other that a corporation to be formed by them under the laws of New Jersey should buy all, or least the greater part, of the stock of each of the defendant railway companies.

Third. The Court erred in finding and deciding that the above described stockholders agreed with each other to exchange their respective holdings of stock in the two defendant railway companies for the stock of such New Jersey company.

Fourth. The Court erred in finding and deciding that the above described stockholders agreed with each other to use their influence to induce other stockholders in their respective companies to exchange their respective holdings of stock in said railway companies for the stock of such New Jersey company, and in deciding that this was to the end that the New Jersey company might become the sole

owner of the whole or at least a major portion of the stock of both said railway companies.

Fifth. The Court erred in finding and deciding that the Northern Securities Company was organized under the plan mentioned in the foregoing assignments, and in finding and deciding that the capital stock of $400,000,000 with which the Northern Securities Company was organized, was the exact amount required to purchase the total stock of the two defendant railway companies at the price agreed to be paid therefor.

Sixth. The Court erred in finding and deciding that when the Northern Securities Company was organized it assented to and became a party to the above mentioned scheme so found by the court as aforesaid to have been devised by its promoters.

Seventh. The Court erred in finding and deciding that the Northern Securities Company was enabled to make purchases of stock of the Great Northern Railway Company from holders thereof not immediately concerned in the organization of the Northern Securities Company, by the advice, procurement and persuasion of those stockholders of said railway company who had been instrumental in organizing the Northern Securities Company.

Eighth. The Court erred in finding and deciding that the scheme so as aforesaid erroneously found by it to have been devised and consummated, placed the control of the railways of said two railway companies in the hands of the Northern Securities Com-

pany, and destroyed every motive for competition between said two railway companies by pooling their earnings for the common benefit of the stockholders of both railway companies; and erred in finding and deciding that any such, or any pooling of earnings was ever contemplated or has ever been made.

Ninth. The Court erred in holding and deciding that all contracts and combinations which merely tend to restrain interstate commerce whether by suppression of competition or otherwise, are in themselves, and although such tendency does not result in any such restraint, violations of the Act of Congress of July 2, 1890, known as the Anti-trust Act.

Tenth. The Court erred in holding and deciding that all contracts and combinations which merely confer the power to restrain interstate commerce, whether by suppression of competition or otherwise, are in themselves contracts or combinations in restraint of such commerce and declared illegal by the Anti-trust Act, though such power is not and is not intended to be exercised.

Eleventh. The Court erred in holding and deciding that every combination whereby the power is acquired to suppress competition between two parallel and competing lines of railway operating under State charters and engaged in interstate commerce, is a combination in violation of said Anti-trust Act whether such power is exercised or intended to be exercised, or not.

Twelfth. The Court erred in holding and deciding that it would have been a violation of said Anti-trust Act had the individual defendants, in pursuance of a previous agreement so to do, sold their shares of stock in the defendant railway companies to a natural person, and had induced their fellow-shareholders to do the same, with the resulting acquisition, by such individual, of a majority of the stock of each railway company.

Thirteenth. The Court erred in holding and deciding that the interstate commerce of each defendant railway company is controlled by its shareholders and not by its Board of Directors.

Fourteenth. The Court erred in holding and deciding that the Northern Securities Company directly controls the commerce of both of the defendant railway companies, though by the charter of each company the management of its business is vested in its Board of Directors, and the companies have and must have separate and distinct Boards of Directors.

Fifteenth. The Court erred in holding that the ownership of a majority of the shares of each of two competing railway companies gives to the owner of such shares a control over each of such companies and its commerce which the holder of a majority of the shares of a single railway company was held, in Pullman's Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587, not to possess over such single railway company or its commerce.

Sixteenth. The Court erred in holding and deciding that the constitution and composition of railway companies chartered by states or organized under State laws, but carrying on interstate commerce, are themselves matters of interstate commerce, and, as such, subject to regulation by Congress. And in holding and deciding that under the Commerce clause of the Constitution Congress has power to prescribe who may and who shall not be shareholders in such companies, and how much stock any one stockholder or combination of stockholders may own in any such company, and to authorize and forbid the consolidation of such corporations or any of them.

And erred in holding and deciding that the acquisition and holding of stock in such railway companies, and all matters of their internal constitution and composition, are not matters over which the State incorporating such company has exclusive power of regulation. And erred in holding that the authorizing or forbidding of the consolidation of any two such railway companies is not within the exclusive power of the State or States by or under whose laws they have been incorporated.

Seventeenth. The Court erred in holding that consolidations of railway companies created by or under State laws and competitors in interstate commerce, are effectual restraints upon such commerce, and that such consolidations, though expressly authorized by State charter, are violations of said Anti-trust Act and illegal.

Eighteenth. The Court erred in holding and deciding that any of the defendants have ever attempted to interpose the New Jersey charter of the Northern Securities Company as a shield between themselves and the law, and that such charter is about the only shield that can be so interposed.

Nineteenth. The Court erred in finding and deciding that "the reasoning which led to the acquisition of that (the said New Jersey) charter" was "that while as individuals the promoters could not, by agreement among themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and by placing the same stock in the name of such artificial being, accomplish the same purpose."

Twentieth. The Court erred in holding and deciding that the shares of the two defendant railway companies held by the Northern Securities Company have merely been placed in its name by the former holders thereof, and that it is not the absolute owner of the same in its own sole right.

Twenty-first. The Court erred in holding and deciding that, "so far as the New Jersey charter is concerned, the question which the Court has to determine is whether a charter granted by a State

can be used to defeat the will of the National legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control."

Twenty-second. The Court erred in holding and deciding that the existing combination gives to a few men acting in concert and in the name of the Northern Securities Company and under cover of its charter the power to control all the means of transportation of the defendant railway companies, and to directly control said companies and all their commerce.

Twenty-third. The Court erred in finding and deciding that "the object and necessary effect" of the combination found by it to exist in this case, "is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two parallel and competing lines of railroad engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property."

Twenty-fourth. The Court erred in holding and deciding that the said Anti-trust Act, if construed as forbidding or restricting the shareholders of the two defendant railway companies from selling their shares to the Northern Securities Company, or exchanging them for shares of that Company, or as forbidding or restraining that company from making such purchases or exchanges and holding the railway shares thus acquired as its own, is a valid law

and not in conflict with the fifth amendment of the Constitution of the United States.

Twenty-fifth. The Court erred in holding that the said Anti-trust Act was intended, and was and is effectual, to include and prohibit "virtual consolidations" of parallel and competing railway companies chartered by the several States, and combinations looking to such "virtual consolidations."

Twenty-sixth. The Court erred in holding and deciding that this proceeding can be maintained under Section one of said Anti-trust Act, although it is alleged in the Petition itself, and appears by the proofs, that whatever the combination or conspiracy complained of was formed to do had been fully and completely done and effected before this proceeding was begun.

Twenty-seventh. The Court erred in disregarding as immaterial the averments of the answers and the proofs in support thereof, showing that the combination in question was not a combination in restrain of commerce; that its purpose was and its effect has been to very largely build up, increase and protect the interstate and foreign commerce of the two railway companies. And erred in considering not all the effects of said combination upon such commerce, but only its possible effect in restraining a minute portion of such commerce—an effect at the most incidental—and in unduly magnifying the extent and importance of such incidental restraint, and holding the same to be the principal if not the only purpose and effect of such combination.

Twenty-eighth. The Court erred in holding that the proofs disclosed any contract, combination or conspiracy in restraint of interstate or foreign commerce, or any other combination than one to build up and enlarge interstate and foreign commerce without any restraining of either.

Twenty-ninth. The Court erred in deciding and decreeing "that the defendants have heretofore entered into a combination or conspiracy in restraint of trade or commerce among the several states, such as an Act of Congress, approved July 2, 1890, * * * denounces as illegal."

Thirtieth. The Court erred in deciding and decreeing that all of the stock of either of the defendant railway companies claimed to be held and owned by the defendant Northern Securities Company, was acquired and is now held by the Northern Securities Company in virtue of the combination or conspiracy mentioned in the last preceding assignment, and erred in decreeing that any of said stock was acquired or is held in virtue of any such combination or conspiracy.

Thirty-first. The Court erred in decreeing that the Northern Securities Company be enjoined, and in enjoining it, from acquiring or attempting to acquire any further stock of either of the defendant railway companies, and from voting any stock at any stockholders' meeting of either railway company, and from exercising or attempting to exercise any control, direction, supervision or influence whatever

over the acts of either railway company by virtue of its holding of stock therein.

Thirty-second. The Court erred in decreeing that each defendant railway company, and its directors, officers, agents and servants, be enjoined, and in enjoining them, from permitting the shares thereof held by the Northern Securities Company to be voted at any corporate election of such railway company; and from paying to that company any dividend on the stock of such railway company which it now claims to own and hold; and from permitting or suffering that company or any of its officers or agents to exercise any control whatever over any of the corporate acts of such railway company.

Thirty-third. The Court erred in deciding and decreeing that the Northern Securities Company does not and cannot lawfully hold shares in *even one* of the defendant railway companies, and has not and cannot enjoy or exercise the rights and powers incident to such ownership; and in decreeing injunctions depriving it of all rights of a stockholder in either one of the two railway companies.

Thirty-fourth. The Court erred in rendering any decree save a decree for a dismissal of the petition and proceeding.

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ARGUMENT.

Summary of the Facts.

1. For some years prior to 1901 the two railway companies had been engaged in an enterprise of building up a great interstate and Oriental commerce. (Supra, pp. 22-31).

2. In April, 1901, they purchased nearly all the Burlington shares at a cost of over $200,000,000, paying for them with their joint bonds, and not with the bonds of the Burlington Co. as stated in the decision, (supra, pp. 32-34). They made the purchase not with any view of placing the two companies, their shares or their commerce, under a single control. (Supra, p. 39).

3. Immediately after this purchase, persons interested in the Union Pacific Ry. Co. attempted to obtain the stock control of the Northern Pacific Co., their object being to prevent the carrying out of the enterprise of the defendant railway companies, and especially to prevent the use of the Burlington road in carrying out that enterprise. (Supra, pp. 46-7).

4. This "raid" (as it is called) on the Northern Pacific stock failed, the failure being largely due to an error of the raiders in buying common instead of preferred stock. (Supra, pp. 48-51). But there was imminent danger that another like attempt might be made and be successful. (Supra, p. 57).

5. Such a raid, if successful, would destroy the commerce the railway companies were building up, and in aid of which they had bought the Burlington shares. (Supra, pp. 53-6).

6. For some years prior to 1901, Mr. Hill and ten other shareholders in the Great Northern Co., holding less than 30 per cent of its stock, had contemplated the formation of a company to which they should make absolute transfers of their shares in consideration of the shares of such new company. Their purpose was that the shares should be voted alike in the future as they had been in the past, and that they should fare alike in any sale of them that might be made. (Supra, pp. 58-60).

7. In June, 1901, after the defeat of the raid, it was first suggested that the proposed company should be enlarged so as to include the Northern Pacific common stock (about $21,000,000) held by the same persons, and later the plan was still further widened so as to include the Northern Pacific common stock (about $20,000,000) held by J. P. Morgan & Co. should they desire to make such disposition of the stock held by them. (Supra, pp. 62, 64-5).

8. It had all along been the purpose of Mr. Hill and his ten associates that every shareholder in the Great Northern Co. should be given an opportunity to join the company as originally planned,—this not because they needed or desired the accession of such other shareholders, but to avoid any complaint of unfair treatment on their part. (Supra, pp. 60-61).

9. This purpose was carried into the enlarged project, and, at the instance of Mr. Morgan, the same opportunity was to be given to holders of Northern Pacific stock. (Supra, pp. 65, 64).

And like the company originally projected, the enlarged company was to be authorized and was expected to acquire shares in coal mines and in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold, and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold.

10. The amount of Great Northern stock held by Mr. Hill and his ten associates was from 33 to 35 milions out of a total capital of $125,000,000. (Supra, p. 58).

In 1896, they had severally acquired $29,000,000 of Northern Pacific common stock, which amount had, on May 1, 1901, been reduced by sales to $20,000,000. (Supra, p. 49).

11. In forming the Northern Securities Co. (which was incorporated November 13, 1901) it was the intention of its promoters that it should acquire, if it could, a majority of Northern Pacific stock, thereby protecting such stock from future raids, and protecting the commerce of the railways from the ruin that would result from a successful raid.

They did not desire or expect that the Securities Co. should acquire a majority of Great Northern shares. Such acquisition was not deemed necessary

for the protection of the stock of that company or of the commerce of the roads. (Supra, pp. 67-68, 71).

12. While the capitalization of the Northern Securities Company is nearly, it is not (as stated in the opinion) the *exact* amount required to pay for all the shares of the two railway companies at the prices ($180 for Great Northern and $115 for Northern Pacific) fixed for such exchanges. (Supra, p. 67).

13. Mr. Hill and his ten associates who promoted the Securities Co. did not agree or bind themselves even to transfer their own shares to the Northern Securities Co. Each of them was left to decide for himself. Mr. Hill retained between two and three millions of his shares. (Supra, pp. 71-4).

And neither they, nor any one concerned in promoting the Securities Co., nor J. P. Morgan & Co. ever agreed in any manner that upon the organization of the Securities Co. they would "use their influence to induce other stockholders in their respective companies to do likewise," as erroneously stated in the decision, II. 1704. (Supra, pp. 67-8).

14. The Securities Co. is not a railway company and has no power to build or operate railways. Its powers are limited to buying, selling and holding stocks, bonds and other securities, with power to aid in any manner any company whose stock or bonds it may hold, and to do all acts designed to aid any company whose shares or securities it may hold, and

protect or enhance the value of its investment; also to hold any real or personal property required for the transaction of its business. In short, it is at once an investment and a financial company. See the Articles, I, 18a.

15. Soon after its organization, and on November 18, 1901, the Securities Co. purchased the Northern Pacific shares that had been acquired by those concerned in the raid, known as the Harriman shares. Those had been purchased from them by J. P. Morgan & Co. The purchase comprised $37,023,000 of common stock and $41,085,000 of preferred stock, at a lump price of $91,407,500, payable (and paid) $8,915,629 in cash, and $82,491,871 in shares of the Securities Co. at par. (Supra, pp. 95-7).

About the same time it received from its promoters and J. P. Morgan & Co., the Northern Pacific common stock (about $42 000,000) held by them.

It availed itself of its right as a common stockholder of the Northern Pacific Co., to purchase at par for cash, the new common stock (issued to replace the $75,000,000 preferred stock retired) to the amount of 75-80 of the amount of common stock held by it.

As a result of these purchases, the Securities Co., at the beginning of the year 1902, and before this suit was begun (in March, 1902) held about $152,000,000 of the total $155,000,000 stock of the Northern Pacific Co.

16. Soon after its organization, Mr. Hill and the other promoters of the Securities Co. transferred to it about 30 millions of Great Northern shares at

$180 in exchange for Securities shares at par, and within three months from its organization, (and before the commencement of this suit) the Securities Co. had acquired, on the same terms and from other holders, about 65 millions of Great Northern shares, making its total holdings 95 millions of the total capital of 125 millions (Decision II, 1705; Col. Clough, I, 244-6, 654).

17. It is not the fact, as stated in the decision (II, 1705), that the Securities Co. was enabled to make the purchase of the 65 millions of stock bought from non-promoters, or of any of it, by the advice, procurement or persuasion of the Great Northern shareholders who had been instrumental in organizing the Securities Co. There is not any evidence in support of this finding, and the evidence is conclusive against it.

The facts proved beyond question are that each purchase was an independent transaction between the seller of stock, and the Securities Co., without solicitation, persuasion or other influence by the Securities Co., or any one else. (Supra, pp. 90-94).

18. At the time of the formation of the Securities Co., the Great Northern shareholders were 1800 in number. Of them about 1200 transferred their shares to the Securities Co. (I, 701).

When this suit was begun, in April, 1902, the shareholders of the Securities Co. were more than 1300; in October, 1902, they were about 1890 (I, 787).

19. The Securities Co. is the absolute owner of the shares acquired by it and of the dividends thereon. The shares are not pooled or consolidated, nor are the earnings of the two roads pooled. It is in no sense a "trust." (Supra, pp. 82, 91-2).

20. The promoters of the Securities Co.—Mr. Hill and his ten associates—do not, all of them together hold, nor have they ever held more than one-third of the $360,000,000 stock of the Securities Co. that has been issued and is outstanding (I. 803), and these gentlemen and J. P. Morgan & Co. have never held more than $140,000,000. (Supra, p. 99).

21. By the charter of each railway company, its commerce is controlled and directed wholly by a board of directors, the members of which are chosen for prescribed terms and cannot be removed during their terms. And by the laws of Minnesota and Wisconsin no person who is a director in one company can be a director in the other. (Supra, pp. 102-3; I. 811-3).

22. The Securities Co. has not attempted to control or meddle with the commerce or the management of either railway, nor is there any evidence that it purposes doing either. Ever since its formation such commerce has been conducted by the two boards of directors in complete independence of each other (Supra, pp. 103, 106).

23. There has been no agreement to suppress and no suppression of competition between the two rail-

way companies, which is as active as it was before the Securities Co. was formed. (Supra, pp. 103).

24. The entire interstate commerce of the two railways, the rates on which can be controlled by those companies without other competition or consent of connecting lines, falls short of three per cent of their total interstate commerce; and any restraint that could be in any event be imposed by the Securities Co. on their interstate commerce could only affect this three per cent. (Supra, pp. 106-8).

All the interstate commerce of each railroad (including the competitive three per cent) has been largely increased since the organization of the Securities Co., owing to the great advantages of the Burlington connection, and to the protection afforded to all the commerce of the roads by placing a majority of Northern Pacific shares beyond the reach of raids, in the ownership of the Securities Co. (Supra, pp. 41-5). And during such period rates have been reduced to such an extent as to reduce net earnings by upwards of $1,000,000. (Supra, p. 684).

25. There has been no increase of capitalization of either railway company, nor any watering of that of the railway companies or of the Northern Securities Co. The capital of each railway remains unchanged. If the Securities Co. had issued its shares at par for cash, and used the money to buy the railway shares for cash in the market at their market value, its outstanding shares would be more than at present. It would have had to issue and sell at least 190 of its shares, to be able to buy for cash each 100

shares of Great Northern which it has obtained by exchange of only 180 of its own shares. And it would have had to pay more than $115 for Northern Pacific.

The course pursued, instead of watering in any way the Securities Co.'s stock, has furnished that company with properties of a market and intrinsic value considerably in excess of the par value of the shares issued by it in payment for them.

THE ANTI-TRUST ACT AND ITS MEANING.

The title of the Anti-trust Act and the sections here material are as follows:

> "An act to protect trade and commerce against unlawful restraints and monopolies.
>
> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceding one year, or by both said

punishments, in the discretion of the court.
* * *

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.
* * *

"Sec. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemd to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (26 Stat. 209, c. 647).

1. The act is wholly a criminal law, directed to the punishment and prevention of crime. The remedy by injunction, etc., given by the 4th section is not to protect property interests, but solely to prevent "violations of this Act" (i. e. crimes, for every violation of the Act is a crime, and, without this section, would not be within the competence of a court of equity to restrain by injunction).

2. Being a criminal statute, the act is not to be enlarged by construction. The first section cannot be stretched so as to make criminal (and whatever the section declares unlawful it makes criminal, and makes nothing criminal it has not declared unlawful) every agreement, combination or conspiracy that

merely *tends* to restrain commerce among the states, or that *confers* on the parties to it or any one else *the power* to restrain trade.

3. The act makes unlawful and criminal every contract, combination or conspiracy in direct restraint of interstate trade or commerce.

The gist of the crime is the contract, combination or conspiracy, and the offense is complete on the making of such contract, or the formation of such combination or conspiracy, though nothing be done to carry it out, and though trade be not in fact restrained.

But to constitute a combination or conspiracy in restraint of interstate trade or commerce, the parties must combine or conspire to do acts which, if performed, *will of themselves restrain* such trade or commerce, and will *directly* restrain it—that is, acts which *operate directly on such commerce*.

If the acts which the parties combine or conspire to do fall short of this, if they are not such as *operate directly on the commerce*, and by such operation *directly* restrain it, then the combination or conspiracy is not within the act.

4. The act makes criminal those contracts, combinations and conspiracies only which *directly* and *immediately* restrain interstate trade or commerce—that is by acting *directly* and *immediately* upon such trade or commerce (171 U. S. 568, 592; 175 U. S. 234, 245).

5. As the crime consists in contracting, combining or conspiring to do acts which by their own oper-

ation will directly and immediately restrain interstate commerce, it necessarily follows that if the acts which the parties contract or combine to do are of that description, they violate the law, though they had no conscious purpose or "specific intent" to restrain interstate commerce by the means of such acts or at all (166 U. S. 341).

On the other hand, if the acts to be done are not such as by their own operation on interstate commerce directly restrain it, the contract, combination or conspiracy to do those acts is not a crime under the Anti-trust law (175 U. S. 234).

6. The act makes criminal every contract, etc., in direct restraint of commerce, without respect of persons.

A contract or combination or conspiracy that would be criminal as in restraint of interstate commerce or trade if made between two or more railway companies, is equally a crime if made between two or more interstate carriers by wagon or stage-coach or ferry, or between two or more interstate traders, wholesale or retail (166 U. S. 312).

7. Any restraint of interstate commerce, or power to restrain it, directly consequent upon the acquisition of property and incident to its ownership, is not, nor is the agreement for such acquisition, made criminal by this act (156 U. S. 16).

Hence, where competitors in interstate trade or commerce agree to and do form a partnership or a corporation, or where one of them buys out the other, or a third person or association of persons buys out

both, whatever suppression of ~~commerce~~ competition or power to suppress ~~commerce~~ competition may follow is not, nor is the agreement to form such corporation, partnership or association for such purchase, made criminal by the act (171 U. S. 505, 567).

8. So where a combination is formed to acquire, and which does acquire, nearly all of an article in common use throughout the country and shipped in large quantities among the states, such ownership, though it gives the power to control the interstate trade and commerce in such article, and to suppress such trade and commerce altogether, is not nor is such combination a restraint of commerce prohibited by the Anti-trust Act, the power being an incident of ownership (156 U. S. 1, 16).

9. By this Act Congress regulates commerce by punishing the making of certain contracts by fine and imprisonment. The regulation is and must be uniform throughout the United States, for an act made criminal when done in Minnesota cannot be innocent when done in Massachusetts.

The matters embraced in the Act, thus requiring a uniform regulation throughout the country, are matters within the *exclusive* jurisdiction of Congress, and no matters that are not within such exclusive jurisdiction are within the act.

If it appears that the states have jurisdiction of any matter (e. g. the ownership of stock in or the consolidation of railway companies doing an interstate business) claimed to be within this act, the existence of jurisdiction in the states is conclusive that such matter is not within the act.

APPELLANTS' PROPOSITIONS.

We shall maintain the following propositions:

1. *The Government is not entitled to maintain this proceeding under sections 1 and 4 of the Anti-trust Act, nor had the Circuit Court jurisdiction of it under those sections, for the conspiracy or combination charged in the petition and found by the Circuit Court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted.*

2. *The only combination of which there is any evidence is a combination formed in aid of commerce, to liberate, protect and enlarge and not to restrain it, and which has liberated, protected, aided and enlarged it, and has not restrained and does not threaten to restrain it.*

3. *There is no evidence of the combination or conspiracy charged in the petition, or of the combination or conspiracy found by the Circuit Court.*

4. *The conspiracy or combination in question whether as alleged in the petition or as found by the Circuit Court, was not a combination or conspiracy in restraint of interstate commerce, for the only things which the parties thereto combined or conspired to do or procure to be done were (1) the or-*

ganization of the Securities Co., and (2) the acquisition by the Securities Co., with their help, of a large majority of the shares of each of the defendant railway companies in exchange for its own shares.

The things so to be done or procured to be done (whether taken separately or together) are such as do not and cannot in any wise restrain interstate commerce, and hence a combination or conspiracy to do them or procure them to be done is not in restraint of interstate commerce.

The Circuit Court erred in holding (1) That the Securities Co., having acquired such majority of shares, has power to suppress competition between the railway companies; (2) that it obtained and holds such power by means of and as a party to the combination or conspiracy and not as an incident of its ownership of the shares; (3) that the possession of such power to suppress competition is of itself, and irrespective of its exercise, a restraint of interstate commerce; and therefore (4) the combination or conspiracy in question was in restraint of such commerce.

5. *The petition does not allege nor do the proofs disclose any facts showing a monopoly or a conspiracy or attempt to monopolize any interstate or foreign commerce.*

6. *The case is not within the Anti-trust Act, for in any view of the matters complained of, their effect upon commerce—whether much or little, for good or for ill—is indirect and remote. The Anti-trust Act and the regulative power of Congress under the commerce clause of the Constitution, are alike strictly limited to matters which directly and immediately affect interstate or foreign commerce.*

7. *The very general language of the Anti-trust Act was not intended to include combinations to purchase railways or railway shares, competing or non-competing, nor consolidations actual or "virtual" of railways or railway companies. Congress, when passing the Act, knew that the railway systems of the country rested on such combinations authorized by state laws, some of them having existed many years. If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void, and the state legislation unconstitutional, it would have said so in plain, specific and apt language.*

The construction put on the Act by all branches of the Government and by everybody down to the commencement of this proceeding, has been in full accord with our position that the act has nothing to do with combinations to own railways or railway shares.

8. *Even though the Government were entitled to any injunction, the decree goes far beyond what the Government was entitled to receive, or the Circuit Court authorized to grant.*

FIRST.

The Government is not entitled to maintain this proceeding under Sections one and four of the Anti-trust Act, nor had the Circuit Court jurisdiction of it under those Sections, for the conspiracy or combination, charged in the petition and found by the Circuit Court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted.

(1) The right of the Government to bring this proceeding in equity and the jurisdiction of the court to entertain it are found in the 4th section of the act, giving the Circuit Courts jurisdiction "to prevent and restrain violations of this act," and requiring the several district attorneys of the United States "to institute proceedings in equity to prevent and restrain such violations."

To ascertain what are violations of this act, we must look to the first and second sections.

The first section declares to be unlawful and makes criminal "every contract, combination (in the form of a trust or otherwise) and conspiracy in restraint of trade or commerce among the several states, or with foreign nations."

The restraint of commerce is not declared unlawful or made criminal by this section—not even if it results from a conspiracy. If, as claimed in this case, the mere holding of a majority of the shares of two competing interstate railway companies re-

strains their interstate commerce, still this section does not forbid or prevent the acquisition and holding of such majority by an individual. And the contracts of purchase made by such individual in the acquisition of such majority are not "contracts in restraint of commerce."

And so if a number of individuals conspire and combine to acquire such majority of shares and convey them to an individual. If such acquisition and holding by an individual in itself restrains interstate commerce, then this is a combination or conspiracy to restrain such commerce, and while it is in progress may be restrained. But suppose the conspiracy has done its work, is *functus officio*, and the shares are held by the individual to whom the conspirators have conveyed them, his ownership of the shares, whether it be a restraint of commerce or not, would seem to be not a conspiracy or combination (or any part, or either) in restraint of commerce, or a "violation of this act" (unless it be also a monopoly forbidden by the 2nd section, which will be considered in its place) so as to be subject to restraint by a proceding like this.

The holder of shares thus acquired would seem to stand on the same footing as if there had been no previous conspiracy, but he had bought them piecemeal, from time to time, in the open market. True, his holding is the result of a conspiracy, but of a conspiracy fully executed. The purpose of that conspiracy and the doings of the conspirators are ended and it has ended with them. While it existed, its acts might be prevented or restrained by the

court, but they cannot be prevented or restrained after they are all done. And the jurisdiction given to the court is to prevent the *executory acts* of a conspiracy, not to undo what has been done by a conspiracy which has itself come to an end. The act is directed at existing conspiracies, not at those which are defunct.

Of course, any conspiracy entered into by the purchaser to restrain commerce, whether by means of the shares so acquired or otherwise, would be a violation of section one, and might, while executory, be enjoined.

And so a combination in existence when the suit is brought may be treated as still subsisting for the purpose of a decree enjoining further proceedings by it as in the *Freight Association Case*. As in other cases, the jurisdiction, once attached, will not be defeated by acts of the defendants. 166 U. S. 290, 309. And so where a conspiracy has not been fully excuted, the court, may, of course, restrain its further execution by enjoining what remains to be done. But these cases are no argument for the jurisdiction under the 4th section, where, before the suit is brought, the acts in violation of the statute which the conspiracy was formed to do have been done, so that there is nothing executory to be enjoined, nor any subsisting conspiracy to be dealt with.

(2) And what is true of an individual would seem to be also true of a corporation. The 8th section of the Act classes a corporation among persons, and makes no distinction between a corporation and

any other person, and no distintion between corporations. If one corporation may acquire and hold a majority of the shares of each of two such railways, without thereby restraining interstate commerce, or becoming a combination in restraint of such commerce, so may any other corporation. If the New York Central Co. may lawfully buy and hold the shares of two or three competing interstate railway companies (as, for instance, the West Shore, the Nickel Plate, the Lake Shore and the Michigan Central companies), or if the Burlington Company might itself have lawfully bought the majority of the shares of these two railway companies instead of its own shares being bought by them, then any other corporation, whether formed for the purpose or not, could make the same purchases. The law does not permit to a railway company what it makes criminal in other corporations.

(3) The petition does not charge a conspiracy or combination to restrain *all* the interstate commerce of the country, nor even all that of the two companies, or to restrain any of the latter commerce by *all possible means*. It was limited in its subject-matter and in the things to be done.

It is charged to have been

> "An unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway sys-

> tems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to-wit:" (I, 7a).

The conspirators combined to accomplish the ends just described only so far as and no farther than they would be accomplished by use of the means which and which only they conspired and combined to use—by doing the acts which they combined and conspired to do—and to which they definitely and strictly limited themselves by the language immediately following that just quoted, viz:

> "A holding corporation to be called the Northern Securities Co. was to be formed under the laws of New Jersey, with a capital stock of $400,000,000, to which, in exchange for its own capital stock, upon a certain basis and at a certain rate, were to be turned over and transferred the capital stock or a controlling interest in the capital stock of each of the defendant railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks" (I, 7a).

It cannot be contended that the conspirators conspired *to do* anything more than these two things, viz: to form a holding company and transfer to it the controlling stock interest, even if these things would not accomplish any of the numerous purposes alleged. Suppose that such transfer would not of itself suppress competition, but that joint action of the boards of directors of the two railway companies would be necessary for that purpose (as it certainly would),

it is not charged that they conspired to corrupt those boards to violate the law.

And if the conspiracy was not thus limited in its means, then it had no limit as to means to be used or time in which to use them. It was a conspiracy in which the individuals named conspired to use all means they might choose to accomplish the purposes named, and to do so during the entire life of the railway companies. This is absurd, and the conspiracy must be held a conspiracy to do the two things specified, and to do nothing else.

Again, the whole theory of the petition is that the "virtual consolidation," monopoly, suppression of competition, etc., are the necessary result of the ownership by the Securities Co. of a controlling interest in the stock of each railway company, and could not be effected without such controlling interest, and would be fully effected by a transfer of such interest to the Securities Co. The petition says that when the conspiracy was formed the conspirators held such controlling interest, and by the terms of the conspiracy such controlling interest was to be turned over to the Securities Co.—of course by the conspirators, for they had it and no one else could have it to turn over. And in turning it over they would have done everything necessary to fully accomplish the purposes of the conspiracy; and moreover they would no longer have in their hands the means of consolidating, suppressing competition, etc., and so could do nothing farther to accomplish those ends, since they would no longer hold a controlling interest. Hence the conspiracy would nec-

essarily be fully accomplished and at an end when the stock was turned over.

However looked at, the petition leaves no room for escape from its plain statement that the only things to be done under the conspiracy were the formation of the Securities Co. and the transfer of the stock to it.

(4) Now, both these things had been done before the petition was filed, and it so states, in Paragraph VIII, as follows, after stating the formation of the Securities Co. on November 13, 1901 (I, 9a):

> "Thereupon, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendants James J. Hill and his associate stockholders of the defendant the Great Northern Co. assigned and transferred to the defendant the Securities Co. a large amount of the capital stock of the Great Northern Co., the exact amount being unknown to complainant, but constituting a controlling interest therein, and complainant believes a majority thereof, upon the agreed basis," of $180 to $100, "and the defendants J. Pierpont Morgan and his associate stockholders of the Northern Pacific Co. assigned and transferred to the defendant the Securities Co. a large majority of the capital stock of the defendant the Northern Pacific Co., the exact amount being unknown to complainant, upon the agreed basis" of $115 to $100.

In the same paragraph VIII, the petition further states (I, 10a):

> "In further pursuance of the unlawful combination or conspiracy aforesaid, the defendant the Northern Securities Company has acquired an additional amount of the stock of the defendant railway companies, issuing in lieu thereof

its own stock upon the basis of exchange aforesaid, and *is now holding, as owner and proprietor,* substantially all of the capital stock of the Northern Pacific Railway Company, and, as complainant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein. * * *

"By reason whereof, *a virtual consolidation under one ownership* and source of control of the Great Northern and Northern Pacific Railway Systems *has been* effected." * * *

It is true that as a sort of makeweight (like various other matters in the petition, such as the statement that the Securities Co. never had money enough to buy the shares it acquired), the petition charges that the Securities Co. is monopolizing the interstate commerce of the two roads, and it is also true that the crime of monopolizing, under the second section, does not require for its commission any combination or conspiracy, but may be committed by a single person, individual or corporate. And so if the Securities Co. is monopolizing commerce, the Government may sue in equity, under the 4th section, for an injunction to prevent it from further violating the act by a continuance of such criminal practice. But, as before said, this charge is a mere makeweight; no facts in support of it are stated in the petition or shown in evidence, and it was disregarded by the Circuit Court. We shall, however, point out, under our 5th point the insufficiency of the petition to charge any monopoly. And so paragraph XIII of the petition (I, 13a), charges that the individual defendants named and their associate stock-

holders of the defendant railway companies have combined and conspired with other persons unknown, to use and employ, in addition to the corporate scheme and devices aforesaid, and in aid thereof, various other schemes, devices and instrumentalities, the precise details of which are at present unknown to the complainant, but will be laid before the court when ascertained.

No attempt, however, was made to prove any such conspiracy as was alleged in this paragraph of the petition, and so it will in this argument be disregarded.

We submit, therefore, that on the petition, this proceeding cannot be maintained to prevent or restrain the alleged violations of section one of the Act.

(5). Turning from the petition to the decision, we find the following (II, 1704):

> "In the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, *conceived the design of placing a very large majority of the stock of both of the last named companies in the hands of a single owner.*
>
> "To *this end* these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the State of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern companies.
>
> "The individuals who conceived and promoted this plan agreed with each other to exchange

> their respective holdings of stock in the last-named railroad company for the stock of the New Jersey company when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole or at least a major portion of the stock of both railroad companies."

After stating that "in accordance with this plan," the Securities Co. was organized on November 13, 1901, and, when organized, "assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity," the decision proceeds to state that:

> "Very shortly after its organization the Securities Co. acquired a large majority of all the stock of the Northern Pacific Co. at the rate of $115 per share, paying therefor in its own stock at par."

And on the following page (II, 1705) it recounts the acquisitions of Great Northern shares:

> "At the same time" (i. e. very shortly after the organization of the Securities Co.) "it acquired about 390,000 shares of the stock of the Great Northern Co. from those stockholders of that company who had been instrumental in organizing the Securities Co., paying therefor at the rate of $189 per share, and using its own stock at par to make the purchase.
>
> "The Securities Co. subsequently made further purchases of stock of the Great Northern Co. at the same rate, and in about three months (viz. by February 13, 1902), had acquired stock of the latter company amounting at par to about $95,000,000 (the total capital of the Great Northern Co. being $125,000,000), "using for

that purpose its own stock to the amount of about 171.000,000.

"The Securities Co. was enabled to make the subsequent purchases of stock from stockholders of the Great Northern Co. not immediately concerned in the organization of the Securtiies Co., by the advice, procurement, and persuasion of those stockholders of the Great Northern Co. who had been instrumental in organizing the Securities Co. and had exchanged their own stock for stock in that company shortly after its organization.

"At the present time (April, 1903) the Securities Co. is the owner of about 98 per cent of all the stock of the Northern Pacific Co. and the owner of about 76 per cent of the Great Northern Co."

[The capital stock of the Northern Pacific Co. is $155,000,000 and 98 per cent is $151,900,000.

The proofs show that all this stock was acquired before the middle of January, 1902. (I, 248, 179).

The capital stock of the Great Northern Co. is $125,000,000 and 76 per cent of it is $95,000,000—the same amount that the Securities Co. had acquired by the middle of February, 1902].

The Court proceds:

"The scheme that was *thus* devised and *consummated*, led inevitably to the following results. First it placed the control of the roads in the hands of a single person, to-wit: the Securities Co. *by virtue of its ownership* of a very large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."

There could hardly be a plainer showing that the work of the conspiracy was ended before suit brought. "The design" was that "of placing a very large majority of the stock of both of the railroad companies in the hands of a single owner." And "*to this end*" the Securities Co. was to be organized to buy the stocks. This had been done, "the scheme thus devised" was "consummated" by the middle of February, 1902. This suit was commenced March 10, 1902.

In the decision the Circuit Court answers (II, 1712) the defendant's argument and its own statement, by saying *inter alia* that "the Securities Co. made itself a party to a combination in restraint of interstate commerce that antedated its organization as soon as it came into existence."

If this statement is anything more than the Court's legal conclusion from the fact that the Securities Co. bought the shares of the two railway companies—if it is meant as a statement of fact—it is absolutely without support in the evidence. (Supra, pp. 75-82, 98-100). Indeed, *it was not even alleged* in the petition.

The same may be said of the statements just quoted that the promoters of the Securities Co. agreed with each other to induce their fellow-stockholders to sell their shares to the Securities Co., and that the latter was enabled to make its purchases of Great Northern shares (from others than its promoters) by means of the advice, procurement and persuasion of the promoters.

Both statements are destitute of support in the evi-

dence, and are in direct conflict with it (Supra, pp. 67-8, 90-4).

But conceding for argument that the Securities Co. did become a party to the conspiracy and that its promoters agreed to use their influence to persuade other shareholders to exchange their shares, and that the latter did so under such persuasion. This did not change the character or purpose of the conspiracy, as already stated in the decision. Its plan and purpose still were to organize the Securities Co.—which they had done—and to furnish it with a large majority of the stock of the two railway companies, which last they accomplished before February 15, 1902, the Securities Co. having by that time acquired 98 per cent of Northern Pacific stock and 76 per cent of Great Northern. The joinder of the Securities Co. to the conspiracy can have no possible bearing on the question here presented, and the decision itself shows that the agreement to use persuasion with other shareholders was fully performed, and a majority and half as much again of Great Northern shares were acquired, most of them by means of the persuasion, before suit brought.

The rest of the argument of the Circuit Court on this point is (1) that the Securities Co. is itself a combination in restrain of commerce; (2) that it has power to restrain commerce; (3) that unless an injunction will lie, the act will be lacking in efficacy.

(1) This is nowhere charged in the petition nor anywhere else in the opinion, where, indeed, the Securities Co. is styled, not a combination but a person,

and a "single owner," and "single person," just as the act itself includes a corporation among persons, and does not look upon it as a "combination."

(2) Assuming that the Securities Co. has power to restrain commerce, it has that power because, as the Court itself elsewhere says (II, 1707): *"the ownership* of all the stock of two parallel and competing roads *rests the owner thereof with the power* to suppress competition between such roads." And again (II, 1705), "The scheme * * * placed the control of the two roads in the hands of a *single person*, to-wit, the Securities Co., *by virtue of its ownership* of a large majority of the stock of both companies."

The power, being thus an incident (and an inseparable incident) of stock ownership, to divest the stockholder of the power he must be divested of the ownership, and so the injunction sought is not an injunction against further proceedings in a conspiracy, but an injunction against the owning of property, on the ground that such ownership, by reason of one of its incidents, gives the power to violate the statute. But the act provides for no such injunction. To enjoin an individual or corporation from owning property or exercising powers incidental thereto, because such ownership was the fruit of a conspiracy or such powers are liable to be used to restrain commerce (there being no charge or proof of any present agreement between such owner and others to use the power for such purpose or that any restraint of com-

merce is intended or threatened) is a proceeding not authorized by the Anti-trust Act.

Of course if any persons are conspiring to restrain commerce, or if one person or several are monopolizing or attempting to monopolize it, they may be enjoined. And if in this case it were proved (what is not even alleged) that at the time the proceeding was brought, the Securities Co. was engaged in a conspiracy (for instance, with the directors of the railway companies) to restrain or monopolize commerce, the further proceedings of such conspiracy might be restrained by injunction. But that is a very different case from enjoining the possesion or use of property because it was acquired by means of a past and gone conspiracy. No such injunction is authorized by the act.

(3) The argument that without injunction in a case like this the act would be lacking in efficacy, would justify the granting of injunctions to restrain the doing of any act made criminal by statute, although for such injunction there were no statutory authority. Such a course would doubtless contribute largely to the efficacy of all criminal laws. But the question is not how to make the statute efficacious, but to find out what it means and enforce it as it stands. And the Circuit Court, seeming to think that, without injunction against the ownership or use of property, the Government will be powerless to break up unlawful combinations, omits to take account of the penal features of the act, usually the only means of enforcing obedience to a criminal

statute, and usually deemed sufficient to that end, and which Congress has evidently considered sufficient in the case of this statute wherever the conspiracy has been carried out.

The decision leaves the case just where the petition placed it, viz: as a case not within the 4th section of the Act.

SECOND.

The only combination of which there is any evidence, is a combination formed in aid of commerce, to liberate, protect and enlarge, and not restrain it, and which has liberated, protected, aided and enlarged it, and has not restrained and does not threaten to restrain it.

In the Circuit Court, this branch of our argument was presented so imperfectly as to leave that court under the impresion that we were trying to justify an admitted restraint of commerce on the ground that such restraint was really for the public good. (See Decision, II, 1712-3). What we attempted to show in that court and shall attempt to show in what follows, is that the combination in question was formed not to restrain commerce, but to enlarge it; and if in its operation it did impose a slight restraint on a small part of the commerce of the companies, it freed that part and all that commerce from a much greater restraint that would have destroyed it.

According to the Circuit Court, the defendants are like a man charged with lessening the size of a house, who should say, "Yes, but I made a better looking house of it." Whereas our case is more like that of the man who, to a like charge, should say, "Yes, I took off a foot at one end, but, while doing so I added thirty feet in place of it." Needless to say that any admission in this branch of the argument that there has been any restraint whatever, is an admission for the purpose of the argument only.

I.

1. Every contract—indeed, every act—must be judged as a whole. It must be interpreted in view of its subject-matter and the surroundings. And every contract and every act has effect in more than one direction.

In judging of the meaning and legal effect of a contract or of any part of it, it will not do to isolate a portion, and pass judgment on that, much less on the entire contract from a study of the isolated portion.

And so the effect of a contract or other act cannot be rightly judged from an examination of its operation in one direction, ignoring its operation in other directions. He would learn little of the effects of artillery who studied only the recoil of the gun.

There is nothing in the nature of a contract or combination affecting commerce and attacked for restraining or monopolizing it, requiring or permitting a different rule for judging it. Whether such a contract or combination does restrain or monopolize depends on its effect as a whole, on its operation in all the directions and on all the subjects of commerce on which it does operate.

One cannot extract a single covenant of the agreement, and say "this covenant restrains commerce," still less can one go farther and say therefore the whole contract restrains commerce.

It cannot be said that the combination in question here restrains the interstate commerce of the two railway companies because in one direction of its

operation it may or does restrain to a small extent 3 per cent of that commerce, if by its operation in another direction it furnishes a needed—an indispensable—protection to *all* that commerce, preserves it from restriction or diminution to an extent far exceeding 3 per cent, and is a principal factor in its extension and enlargement.

The rule stated has always been recognized as specially applicable when there is question of a restraint of trade—and with reason, for the ramifications of trade are wide spread and far reaching.

> "All the facts and circumstances are, however, to be considered, in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce." *Addyston Pipe Co. v. United States*, 175 U. S. 211, 245.

And see, to the same effect, *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 68, per Bradley, J.

2. There is hardly any agreement of trade or commerce which does not in some direction of its operation restrain trade. A grain dealer in Minneapolis, by contract, on a sufficient consideration, gives to a dealer in Chicago a ten days' option of purchase of all the wheat then in his warehouse in the former city. And in the contract he specially covenants that during the period of option he will make no sale to any one else. The special covenant taken alone is plainly a restraint of trade. But no one would claim that the whole contract, including the special covenant, was in restraint of interstate or any other trade or commerce.

And so in the case of all the contracts which at

common law are held not to restrain trade though they include special covenants directly restraining it. In U. S. v. Addyston Pipe Co., 29 C. C. A. 141, 150; 85 Fed. 271, 280, 281, Circuit Judge Taft classifies them under the heads of agreements for sale of a business, where the seller covenants not to carry on the same business; for sale of property where the buyer covenants not to use it in competition with the seller's business; by partners not to engage individually in any business, whether in competition with that of the firm, or not, etc.

In each of these instances, the special covenant *directly* restrains trade. It acts directly on trade by restricting the power or freedom of the covenantor to carry it on. A contract consisting wholly of such a covenant on the one hand, and a consideration however ample on the other, would as a rule be void on its face. But in each instance the whole contract, of which the covenant forms part, and therefore the covenant itself and the restraint of trade which it imposes, are valid. The reason is that though the contract, in one part of it and by its operation in one direction restrains trade, yet, taken as a whole, and notwithstanding such restraint, the contract enlarges and protects trade and is beneficial to it.

Thus, take the first of the cases, that of a seller who covenants not to engage in the business. Without the restraint imposed by the covenant there would or might be no sale in the particular case; and, in general, if the buyer could not protect himself by placing such restraint on the seller, there might be no buyers; a man wishing to retire from business might

not be able to sell that business to another who would carry it on, but might be obliged to wind it up; in which case there would be a business the less, and trade would be lessened to that amount.

3. And so in other cases than sales or contracts of any kind. Every charge by way of toll on a turnpike or bridge, or for transportation on a railroad, is in itself, in one direction of its operation, a restraint on the commerce of those highways. The complaint in this case is that the Securities Co. restrains commerce by suppressing competition, which suppression increases charges and so lessens the volume of commerce. And if increasing the charges restrains commerce, it must be because any charge is a restraint, and indeed this goes without saying.

But it does not follow that those imposing this restraint on interstate traffic by rail, turnpike or toll-bridge are criminals under the Anti-trust law. Without such charges—without charges sufficient to maintain the turnpike, bridge and railway and pay the cost of operating the latter, and a reasonable profit on their value or the capital invested in them—the existing highways of this description would go to ruin and no more would be built. And so though the charge be a restraint, yet, looking at the cause which occasions it, and the great increase of commerce which that cause products, looking at the operation of the charge as furnishing the means of maintaining and operating the bridge or railway, and weighing the restraint against the increase, the latter greatly exceeds the former; and therefore,

looking at the whole conduct of the proprietors of the turnpike, bridge or railway, they do not restrain trade.

No state has power to pass a law directly restraining such interstate commerce as consists in transportation. And a tax or charge on the gross receipts of such transportation is a direct restraint on such commerce. A law laying such tax on the gross receipts from interstate transportation by a railway already in operation is *ultra vires* of a State and is void.

But suppose a State, when chartering a company to build an interstate railway, requires the company to pay, for the whole period of its existence, 20 per cent of the fare received by it from each interstate passenger whom it carries. This last provision, taken by itself and in one aspect of its operation, is clearly void; it would certainly be void if enacted in respect to an existing railway. But in another direction it operates to enable the company to procure the charter and build a railway for interstate commerce. And so, taking the whole charter—the whole law—together, we find that its operation is to enlarge interstate commerce by creating a new route, and the charge is laid on a new commerce created by the act. The charge imposed by the act is laid on the commerce created by the act and which would not exist without it, and so commerce is not restrained, but enlarged; not enlarged so much as if the act had laid no burden on it, but still enlarged. And the act is therefore valid, and just such an act was sustained in *Railroad Co. v. Maryland*, 21 Wall., 456.

4. In every case where the question is whether a contract restrains the trade of a party to it, or a combination restrains trade among its members, or whether such contract or combination restrains the trade or commerce of others than the parties to it, the contract or combination must be judged as a whole, and in the light of the circumstances in which it was made. The whole enterprise of which it was an essential part must be taken into account; and if the whole enterprise, including the contract or combination, is in furtherance of trade—if the net result of carrying it out would remove from trade more or heavier shackles than are thereby laid upon it,—then the portion of the enterprise which, standing alone, would restrain trade, is free from objection whether at common law or under the Anti-trust law.

II.

1. The purpose of the formation of the Securities Co. is not open to question. The defendant railway companies were engaged in an immense enterprise of creating and building up an interstate and foreign commerce, which could not fail to be of inestimable benefit to the country traversed by their railways and to producers and shippers at all points along their lines or reached by their connections. As a necessary adjunct to this enterprise they bought the Burlington shares, incurring obligations therefor exceeding 200 millions of dollars. Immediately thereafter came the attempt of a rival line to defeat

their enterprise, to destroy the commerce they were building up, and to subordinate the interests of the Northern Pacific shareholders and the interests of the territory which it served to those of a rival railroad and a distant section of the country, at the same time threatening the very means of existence of the Great Northern Co. This attack was made by the purchase of $78,000,000 of Northern Pacific shares in the market. The attack having been defeated by a concurrence of circumstances such as could not be hoped for in case of a second raid (no future raiders could make the fatal mistake of buying preferred shares instead of common), the holders of a majority of Northern Pacific shares and less than one-third of Great Northern common shares took measures for the defense of their own interest as shareholders and those of their fellow shareholders. A plan had long existed among these few shareholders of the Great Northern Co. for forming a corporation of which they should become members and to which they should transfer the ownership of their Great Northern shares. Their motives in this are stated, *supra*, p. 59. As a means of defense against a future raid it was determined that this projected company should be organized, and that the holders of the majority of the Northern Pacific common shares should have the right to transfer them to it. There was no contract on their part to do so, nor was there need of any, for they had a common interest and a common desire that these Northern Pacific shares should become the property of the new company. The company was also made large enough to acquire such

shares of other Great Northern holders as should wish to come into it, and this solely for the reasons stated, supra, pp. 67-8. But there was no especial desire and but little expectation that any great number of them would do so, their shares being valued at from 15 to 20 per cent below their current market value for purposes of exchange for those of the new company. Still, the larger the amount of Great Northern stock held by the new company, the more efficient the defense, the greater the security, against future raids on the Northern Pacific Co.

That this defense and this security were the only thing aimed at, that the obtaining of them was the sole motive and the sole purpose in placing the ownership of a majority of the shares of either railway company in the Securities Co., cannot be questioned. The testimony is plenary, much of it offered and vouched for by the Government, and all of it from witnesses of the highest character.

2. Their sole motive and purpose, then, was self-defence. Did the danger exist? Was it of a character to require such a defence?

That it existed we have the testimony of witnesses than whom none more competent could be found were the whole country to be searched for such. Nor can there be any question of their credibility—some of this evidence also is produced and vouched for by the Government, and no opposing evidence has been offered.

The magnitude of the peril is shown by the same witnesses—by the anxious care they took to guard

against it. And Mr. Hill, than whom there is no more competent judge, has testified in a passage quoted, (*supra*, p. 54), that in case of the success of such an attack the measure of the injury to the interstate and foreign commerce of the two railway companies "would be destruction."

Such was the sole purpose in forming the Securities Co. and vesting in it the title to a majority of the common stock of the Northern Pacific Co. and to such shares of the Great Northern Co. as the owners of them might choose to transfer to it—a purpose to preserve and protect the interstate and foreign commerce of the two railway companies (and especially that portion of it in aid of which the Burlington shares had been bought) from a danger which threatened and which had already nearly accomplished their ruin. Such were the means taken to effectuate that purpose, to preserve and protect such commerce. That the means were well chosen to ensure such protection cannot be questioned. By these means the protection has been secured, and it does not appear in evidence, nor can it be shown by argument, that any other means existed adequate for that purpose.

Certainly, the purpose was a lawful one. These men surely had a right to protect their property interests. A man may always defend his property, and sometimes even to the point of taking human life. "The law of self-defence and protection applies to one's business as well as to one's person." *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946, per Priest, J.

3. And this one purpose was not only justifiable as a measure of self-defence, but it was laudable and meritorious insomuch as it defended and protected and secured the maintenance, and also the enlargement and upbuilding, of the interstate and foreign commerce of the two railway companies, including the identical 3 per cent of such commerce which they are now charged with conspiring to restrain and monopolize.

It made secure the Burlington connection with the manifold advantages described in the evidence, (*supra*, pp. 34, 41) both to the inhabitants of the Burlington territory and of the territory traversed by the Great Northern and Northern Pacific, not the least of the benefits to these last being that they thereby have an assurance they could not otherwise obtain of being supplied with the fuel that is necessary to enable them to live in the country at all.

4. It is also proved by direct testimony, much of which also was produced and vouched for by the Government and which no attempt has been made to contradict, that in all the proceedings of these gentlemen, they had no purpose whatever of creating a monopoly or restraining commerce in any way whatever. They never even thought of such a thing. (*Supra*, p. 83). And all the circumstances corroborate this (*Supra*, p. 98). Indeed, their minds were too full of the great commerce in which their millions were embarked, to have room for the 3 per cent competitive commerce they are charged with monopolizing.

5. The case is not here presented of an isolated contract or combination which in its purpose or effect restrains interstate commerce. The combination here was not isolated or independent. It was not made for the sake of making it and thereby restraining or monopolizing commerce. It would not have been made but for the fact that the companies had an *existing* interstate commerce and a great enterprise which was in jeopardy, not of restraint only but of destruction. It was in aid of that enterprise, to save commerce from destruction, that the combination was made. It was strictly ancillary to that enterprise as a necessary protection to it—as much so as the covenant of the seller of a business that he will not engage in it; and as fully as such a covenant, and on the same grounds, it must be deemed not in restraint of commerce, as such a covenant was so declared not to restrain trade in the *Freight Association Case*, 166 U. S. 290, 329.

And these shareholders had an even greater right to protect the very life of the commerce of their companies from aggression than the buyer of a business has to protect his purchase by exacting from the seller a covenant in terms restraining trade. Their need of protection is no less, and that of the buyer is a necessity of his own making. He is under no compulsion to purchase and thereby incur the risk against which he seeks protection.

6. The purpose of the formation of the Securities Co. was to protect the commerce of the rail-

ways,—to protect it from a restraint that would be destruction—and such is its effect, even upon the three per cent of that commerce which it is charged is in some measure restrained. But such restraint, if there be any, and if it is properly a result of the combination, neither of which we admit, is, at most, but incidental and wholly collateral to the principal effect of the formation of the company and the sole purpose of its founders.

If a combination formed to maintain and promote interstate commerce on a magnificent scale, and which does thus maintain and promote it, is to be adjudged a combination and conspiracy in re straint of commerce, and its members therefore criminals, because of such slight and incidental restraint as is alleged here,—a restraint, too, which proceeds, as is shown elsewhere, not from the combination, but from the ownership of the railway shares—then, in the language of this Court in the *Hopkins Case*, 171 U. S. 578, 600, "there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce, and possibly to restrain it" And we may add there would not be prisons enough to hold the criminals, for hardly a business man engaged in affairs of any magnitude could avoid a daily violation of the law.

7. The case is not here presented of a contract or combination which restrains trade and is made for that purpose alone, but which, in its unforseen operations in other directions, enlarges trade elsewhere by removing a restraint from it—a case

where the parties have builded better than they knew. Whether the parties to such a combination should fare any better than other sinners out of whose evil doings good may have been educed, is a question not arising in this case. Here the one purpose is to protect commerce from restrictions by its enemies which would strangle it.

8. On this matter of combination of shareholders for self-defence—for the defence of their property and the property and the interstate and foreign commerce of the railway companies in which they were so largely interested—the case is widely different from the *Freight Association* and *Joint Traffic Cases*, and the *Addyston Pipe Case*. In each of those cases the defendants combined, not to protect their own or their companies' business from attack by others, but (as they pleaded) to protect it from disastrous competition *among themselves*, and in the first two cases from a secret competition forbidden by law. They made an agreement on its face forbidden by law, to accomplish what they could just as well have accomplished by obeying the law. And in each case the agreement went far beyond what was needed for protection. In the railway cases an agreement against secret (and illegal) rate-cutting would have been sufficient and lawful. There was no call for an agreement surrendering the power to make and publish rates. All these agreements to protect the makers of them against themselves have no element of protection properly so called.

THIRD.

There is no evidence of the combination or conspiracy charged in the petition or of the combination or conspiracy found by the Circuit Court.

The proofs do show that a few gentlemen, not holding a majority or controlling interest in the stock of either railway company, projected an investment and financial company, at first simply to keep their shares together, and, in its ultimate stage, also as a means of defence of their interests as shareholders against aggression.

Only a very few of the alleged conspirators had anything to do with the formation of this company —the Securities Co.

Mr. Morgan and his firm had nothing to do with it, (supra, pp. 76-7; I, 300), and there is no evidence that Col. Lamont had.

There was no doubt a combination to organize the Securities Co., with power to acquire shares of the two railway companies, as well as of other corporations in exchange for its own, and it was expected that the holders of a majority of the Northern Pacific common stock would transfer their shares to it; and it was understood that all shareholders of both railway companies might do the same. But there was no combination to transfer any shares, no agreement to transfer any. It was left open to every one of the promoters of the company to go into it or stay out. See pp. 71-4, *supra*.

It is in evidence that Mr. Hill and his associates

in the Great Northern Co. held among them (severally) about 33 millions of the 125 millions of the capital stock of that company, being about 27 per cent. They also held (severally) about 20 or 21 millions of Northern Pacific common stock, and J. P. Morgan & Co. held about the same amount until some time in August, 1901, when he sold some 10 or 12 millions to Mr. Hill and friends individually (Mr. Morgan I, 349-350; Mr. Kennedy I, 201-2,) the aggregate of these holdings being between 41 and 42 millions. J. P. Morgan & Co. do not appear to have held any Great Northern stock.

Now, if there was a conspiracy to turn over any stock at all to the Securities Co., *it did not include the turning over of any stock not held by the conspirators.* Counting Mr. Morgan's firm among them, they might turn over about 42 millions of Northern Pacific common stock, and about 33 millions of Great Northern common stock. This was not a majority or controlling interest of either. The outstanding shares of the Northern Pacific Co. amounted to 155 millions. True, the 42 millions might become a majority of Northern Pacific stock upon the retirement of the preferred stock, and remain so until the issue of the 75,000,000 of new common stock to take the place of the retired preferred stock. If these two proceedings were simultaneous, there never would be a time when 42 millions of common stock would constitute a majority or controlling interest. If the holders of the 42 millions should, upon the retirement of the preferred stock, avail themselves of their right to their

proportionate share of the new common stock at par (*i. e. 75/80 of 42 millions*) on paying therefor $39,000,000, they would hold a majority of all the stock of the company. But the retirement of the preferred stock was a matter for the holders of the common and preferred, or of the directors. The conspirators, as holders of but 42 millions, could not compel it. Nor could they, after turning over their 42 millions to the Securities Co., provide that company with enough of the new issue of common stock to give it a majority. The Securities Co. would have to get that for itself.

And so with the Great Northern party. There is no evidence that they agreed to put in any shares, and *certainly none that they contemplated putting in more than they had*—about 33 millions; and of this from 2½ to 3 millions—part of Mr. Hill's holdings—were not put in.

But assuming that the 42 millions of Northern Pacific gave control, and that the conspirators agreed to turn over all their shares to the Securities Co., still the fact remains that the shares to be transferred by the conspirators and those which they did transfer, at most were "a controlling interest" *in one company only*, and that *they did not conspire to and did not transfer a controlling interest in the Great Northern Co.* Thirty per cent does not give control even of a shareholders' meeting, and these conspiring Great Northern shareholders never controlled that company in any sense of the word. Like all the shareholders—the other 70 per cent as well as themselves—they supported Mr. Hill's man-

agement and sent him their proxies, and in respect of "control" they stood on the same footing as the rest. So far as there was any control except in the whole body of the stockholders, it was in Mr. Hill alone.

Col. Clough, vice president of the Great Northern Co. from 1890 to 1901, says, on cross examination (I, 807):

> Q. Is it not a fact that Mr. Hill, with his group of friends, with their relatively small holdings in the Great Northern to which reference has been made, have found that sufficient to control the Great Northern Railway?
>
> A. It was not the holdings in the stock that Mr. Hill and his friends had that induced the great majority of the stockholders to send their proxies favorable to his re-election. It was the favor with which the policy of Mr. Hill and his associates had met for years that induced all the other stockholders as a body, practically, to support that policy and favor its continuation. It wasn't any holding that those other gentlemen had at all. That had nothing to do with it.
>
> Q. You think then that a strong body of very rich men, controlling 35 millions of the stock of the Great Northern Railway had nothing to do with their effectual control of the operations of the road?
>
> A. Absolutely nothing. I know from my own knowledge it had nothing to do with it. It was merely the support that the majority of the stockholders gave on account of their favoring the policy of Mr. Hill.

And the petition says (par. VIII) that he "was the president and controlling power in the management of the Great Northern Co." He possessed this control and power, not because of his stock ownership, but because of the confidence reposed in him by

the shareholders by reason of the character of his management.

But such a "control" resting on such a basis, or any control not resting on the holding of a majority of shares, is in no sense a control of the stock, still less of the corporation. Otherwise, the holders of a majority of Northern Pacific shares, in conjunction with Mr. Hill, holding perhaps no more than 10 shares of Great Northern, would also "control" the Great Northern, or have a "controlling interest" in the stock of that company.

And certainly this control held by Mr. Hill by reason of his personality and the confidence reposed in him by the stockholders, was not a thing that could be turned over to the Securities Co., or that the conspirators conspired to turn over to it.

There was therefore no conspiracy to turn over a majority or controlling interest in Great Northern stock, however it might have been with the Northern Pacific shares. And if a controlling interest in the shares of *both* companies in the hands of the Securities Co. was needed to constitute a restraint of commerce, (and no other restraint than that held to result from such possession is found by the Circuit Court), then the conspiracy, being to turn over such interest *in one company only*, was not a conspiracy in restraint of commerce.

It is true that after the organization of the Securities Co. it acquired from other shareholders of the Great Northern Co. stock enough to give it a majority. But *this was no part of the conspiracy, and these shareholders were not parties to the con-*

spiracy. They acted independently, each for himself, and so far as appears with no knowledge of the conspiracy, and even in ignorance that the Securities Co. held or was likely to hold any Northern Pacific shares. The company's circular to them of November 22, 1901 (*supra*, p. 88), and Mr. Hill's letter (*supra*, pp. 89, 90) are wholly silent on this point. It can't be said that their transfers or the company's acquisitions from them were part of the things which the alleged conspirators combined or conspired to do, especially when the things they did conspire to do are expressly declared and limited in the passage quoted from the petition.

And while the petition states that these acquisitions were "in furtherance of the unlawful combination or conspiracy aforesaid," this does not mean that they were *among the acts which the conspirators conspired to do*, especially as the petition, in the same paragraph VIII, had already alleged the previous turning over to the Securities Co., by the conspirators themselves, of all the shares which, by the terms of the conspiracy as charged in the petition, were to be turned over to it.

And these acquisitions from other shareholders were not *necessary* consequences of the acts to do which the conspiracy was formed, so that it cannot be said that the conspirators must have intended them, for each of them required the intervention of an independent actor, who might or might not sell, according to his own will and pleasure.

And while the petition does not charge that the conspirators contemplated such purchases of Great

Northern shares by the Securities Co., it negatives any such purpose, for

1. It expressly states that the conspiracy included the acquisition of those shares only—that majority or controlling interest—possessed by the conspirators and which it says they turned over.

2. The possession of any additional shares by the Securities Co., was, according to the theory of the petition, not needed to effect the purpose of the conspirators. Having received from them either a majority or a "controlling interest," it would, according to the petition, have every power over the commerce of the roads—every power to suppress competition or monopolize the traffic, the object of the conspiracy—which stock ownership could give; every power which the conspirators thought necessary to the success of the conspiracy.

II.

The Circuit Court, however, adds a new feature to the combination or conspiracy, charged in the petition, by its finding that as part of their scheme the conspirators agreed with each other to use their influence to induce other shareholders to exchange their shares for those of the Securities Co., and that the Securities Co. was enabled to make its purchases of Great Northern shares from others than the promoters by the advice, procurement and persuasion of the promoters. (II. 1704, 1705; supra, pp. 10, 11).

We have elsewhere (supra, pp. 67-8, 90-95) point-

ed out the errors in these statements and adduced a portion of the evidence refuting them. We subjoin additional excerpts to the same effect. So far as we are aware there is nothing in the record—not even Mr. Hill's letter, (supra, p. 89)—which in any way impairs the effect of this evidence. There is not even a color of proof to sustain the findings.

By the evidence before printed (supra, 67-8, 90-95) and that which immediately follows) these facts are plainly established:

1. The promoters of the Securities Co. did not think it necessary for their purpose that it should acquire a majority of Great Northern shares, or any more than those held by such promoters.

2. They had no desire to admit such outside shareholders into the Securities Co., and would have preferred not to do so, except that they did not wish to expose themselves to criticism or complaint should such shareholders not be given an opportunity to come in.

3. They accordingly agreed that such opportunity should be offered, but never agreed to use their influence to induce its acceptance by such outside stockholders.

4. They did not advise, procure or persuade any of such outside shareholders to exchange their shares, nor did the Securities Co. obtain any of such shares by means of any such advice, procurement or persuasion.

Mr. Hill says (I, 87):

"After discussing the matter with Mr. Kennedy, and with some of my friends from abroad who were here in July, it was considered, and I may say determined, to go on and form the company. Many of them felt that they would like to give all the shareholders of the Great Northern the right to participate in any company, the old leading shareholders to put their stock in, and they said if a close corporation was formed it would be the first time in the history of the property that each and every shareholder had not the same opportunity that every other shareholder had, and they discussed that with me, sometimes one and sometimes another. There was no meeting to discuss it. The general feeling, however, was among those with whom I talked, and I had that feeling myself, that we would give each shareholder the opportunity to come in at the price we put our own in, if he desired, and if he preferred to stay out, that was his privilege."

I, 115: "Q. Was it your expectation and desire at the time of the organization of the Northern Securities Company that a majority of the stock of the Great Northern Railway Company should also be exchanged for Northern Securities Company stock?

A. I think it was expected that a majority would be exchanged. At the same time the market price at that time was considerably higher than the price the Northern Securities Company purchased the Great Northern stock at. It was a matter that was left to the shareholders."

Mr. Kennedy testifies (I, 194):

"Q. Now, Mr. Kennedy, is it not a fact that in the autumn of 1901 Mr. Hill, J. P. Morgan & Co., D. Willis James, George F. Baker, Lord Strathcona, and Lord Mount Stephen held a

majority of the stock of the Great Northern and of the Northern Pacific?

A. I can't speak as to a majority of the Great Northern; I don't think they hold a majority of the Great Northern; I am pretty sure they don't."

I, p. 195:

"Q. Why did you plan on getting a majority of the Northern Pacific and not of the Great Northern, Mr. Kennedy?

A. Well, my idea was in consequence of what took place last May; we didn't want to be subject to such an attack as took place last year.

Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it

A. Yes, sir.

Q. Under all circumstances?

A. Under all circumstances.

Q. You had no fears, Mr. Kennedy, that the Union Pacific nor the Canadian Pacific, nor any other railroad company could go into the market and buy up a majority of the Great Northern?

A. I don't remember thinking anything about it.

Q. Well, why did you distinguish? You say you wanted a majority of the Northern Pacific where you could absolutely control it so as to prevent another such occurrence as that of May 9?

A. Yes.

Q. Weren't you equally anxious to prevent the possibility of such an occurrence with reference to the Great Northern?

A. I think those who were called Mr. Hill's associates had enough stock to prevent anything of that kind."

(I, 196-7): "Q. It was a fact, Mr. Kennedy, that so far as your own feelings went you were perfectly satisfied that a successful attack could

not be made on the Great Northern?

A. I was satisfied of this, that if we held the controlling majority of the stock of the Northern Pacific, the chances were remote that they would make an attack on the Great Northern.

Q. Now, it was finally determined, Mr. Kennedy, after it was decided to take in a majority or more of the stock of the Northern Pacific, to throw open the privilege to all stockholders of the Great Northern to go into the Northern Securities Company?

A. Yes, sir.

Q. And was that done for the purpose of placing a majority of the stock of the Great Northern in the Northern Securities Company, as well as a majority of the Northern Pacific?

A. I think not. The idea was to give the Great Northern stockholders who might desire to come in an opportunity to come in, that they might not feel that they were not fairly treated if certain persons went in and other persons left out."

(I, 215): "Q. On pages 233 and 234 of the testimony this question was asked you, Mr. Kennedy: 'Now, Mr. Kennedy, is it not a fact that in the autumn of 1901, Mr. Hill, J. Pierpont Morgan & Co., D. Willis James, George F. Baker, Lord Strathcona and Lord Mount Stephen held a majority of the stock of the Great Northern and Northern Pacific?

A. I could not speak as to a majority of the Great Northern; I don't think they held a majority of the Great Northern; I am pretty sure they don't; but we did hold a majority of the stock of the Northern Pacific; at least I was so informed.' Did you mean that those gentlemen held a majority of the Northern Pacific?

A. Not those gentlemen, but others who were friends of Mr. Hill; who they all were, I don't know.

Q. That was the common stock?

A. The common stock.

Q. You didn't mean the total stock?

A. No, no; the common stock."

(I, 216): "Q. Now, in the organization of the Northern Securities Company, or previous to the organization of the Northern Securities Company, was there any question made or any discussion that that company was organized for the purpose of acquiring a majority of the stocks of both those railroads for the purposes of maintenance of rates, railroad rates, suppression of competition, or controlling competition or commerce on those roads?

Mr. Boutelle: Objected to as not proper cross examination and incompetent, irrelevant, and immaterial.

A. I have never heard of such a thing. I have never heard such a thing suggested in any quarter whatever."

Mr. Hill says:

I, 699: "When it came to making a holding company that would hold the ownership of the stock held by these people, they all hesitated about forming any company to hold the shares of the Great Northern Railway in which all the shareholders might not be allowed to participate, if they so desired. And in that way it became necessary—it was decided, and it was decided early, possibly in June; it had been discussed at least a year before that. I know Mr. Farrer, of the firm of Baring & Company of London, was here and he said, 'No matter what you do—your company has always had the reputation of dealing with all the shareholders on the same basis—no matter what you do, try and keep that.' Everybody seemed to be of the same mind—that all the shareholders might participate in any advantage that any shareholder might have, so far as related to the action of those who were most active in the company's affairs.

A. * * * we were to offer the Great Northern shareholders the right to come in if they desired,

but the market price was higher than the price offered.

Q. The price offered was 180, I believe?

A. Yes, sir.

Q. And what was the market price of the Great Northern stock during the fall and winter of—

A. I think it ran from 187 to 190 or 195. I don't think it has ever been 180 from the time the offer was made to the present time."

(I, 706): "Q. And so, in order to continue the policy which had obtained for so many years for the benefit of the company and of the public, they arranged to put their holdings into this holding corporation,—these shareholders?

A. The eleven shareholders?

Q. Yes.

A. And asked that the same offer be made to all the shareholders so that they might not be charged with any discrimination, or doing anything for themselves that they were not willing to do for all the shareholders."

(I, 708-9): "If the question has reference to the desire or preference, I should answer that if the individual men who formed the Securities Company had their choice and all the shareholders were there and could say, 'We release you from any responsibility,' we would have preferred to have had the Northern Securities Company stock restricted to the 35 millions. There isn't any question about that. I have discussed that with the shareholders many, many times. One gentleman spent an afternoon with Mr. Grover; another spent an evening at my house; came over from London to discuss it. so, it is not a new question with us. The question was, shall we make a corporation and close the door on our old associates? If we do, it is the first time that anything has ever been done in which any shareholder had the advantage over all the shareholders. *And that was the reason for making the offer, and the only reason for making the offer.*

Q. Now, what was the response to the offer? How much stock of the Great Northern was exchanged for stock of the Northern Securities Co.?

A. Oh, I don't recall the amount. I know a great deal came in before—I should say nearly half of it came in very soon after—maybe 40 per cent. Then a lawsuit was started, I think by the State of Minnesota first, or Peter Power, I am not sure which—but a lawsuit was started, and we took pains then—a great many had sent their stock to the office—we took pains to notify them that a lawsuit had been commenced, and the stock was not purchased, the transaction was not closed, until they were notified and asked: 'Do you still want to sell your stock?' We felt it was a duty to let them know that such a lawsuit had been commenced, as that might make some difference in their view as to whether they wanted to sell their stock to the Securities Company or to hold it as Great Northern."

Col. Clough says, (I. 787):

"Q. Had you knowledge of the fact of transfers of the Great Northern and Northern Pacific to the Northern Securities Company?

A. Yes, sir, I knew about that; it was done under my supervision.

Q. You had general charge of the New York office of the Northern Securities Company?

A. As far as it is entrusted to the officials; the business affairs of the Northern Securities Company are, under its charter and by-laws, controlled by its board of directors and its executive committee.

Q. You were in the office, and had charge of the office?

A. Yes, sir.

Q. Now, state whether the transfers were individual, absolute, without reservation, and without solicitation from the Northern Securities Company—fully.

A. To answer the first question, every purchase of stock that has been made by the Northern Securities Company (whatever stock it may be) has been by direct individual transactions and negotiations with the owner of that stock, except in the one instance that I have referred to in my previous testimony of the purchase of the Harriman and Pierce stock, where J. P. Morgan & Co. negotiated the purchase and the purchase was assigned to the Northern Securities Company.

Q. Now, were the transfers absolute?

A. They were absolute and unconditional in every case.

Q. Were they solicited by the Northern Securities Company?

A. No, sir; in no case. The Northern Securities Company, some time in November, I have forgotten the precise date, I think it was the 22nd, issued a circular to each individual stockholder of the Great Northern Railway Company, of which a copy has been introduced.

Q. Were you present in the office of the Northern Securities Company at the times when holders of shares came there to make transfers or to make inquiries?

A. Yes, sir; I was there constantly in attendance at all times during practically every business day from the time of the organization of the company until, I might say, last Friday."

Q. Now, were a considerable number of transfers made there by parties appearing personally or by their representatives?

A. Yes, sir, quite a good many people brought their stock in personally; many others sent it by mail.

Q. What information or suggestions were made to them respecting the transfers?

A. Why, there was nothing special; the transaction would be that that individual would present his Great Northern stock, or Northern Pacific stock, as it might be, and ask to sell it to the Company and to receive in pay the stock of

the Company. When litigation against the Company was threatened, I think in every instance that fact was communicated to every person bringing his Great Northern and Northern Pacific stock to the Securities Company to sell it.

(I. 790): "Mr. Morgan was very strenuous that when this stock was all out, if he sold his stock to the Northern Securities Company, that each of the other holders of the common stock, if he wanted to do so, should have the privilege of selling to the Northern Securities Co. at the same rate. He was extremely insistent on that. Some of the eight or nine or ten Great Northern stockholders who were consulted in this matter had quite early taken a similar view in regard to Great Northern stock. They suggested that it had been the settled policy of the Great Northern management that whatever benefits of any kind should be open to the holder of any of the Great Northern stocks should be open upon equal terms to all the others. * * *

It was believed by myself and Mr. Hill and Mr. Kennedy and some of the others who had watched things very closely, that there was very little probability of anything nearly like the whole of the stockholders, of the Great Northern at least, coming in, because that was a well established stock in the market. It had been on the market for ten years and had a high market value and was thoroughly well known. It was held entirely by investors. There had never been any speculative movement in Great Northern stock, and it was thought that, being held that way, the holders of a well-known and well-established stock would be loath to sell it and take in pay the stock of a new and comparatively unknown company. But finally it was said, and that was the argument which prevailed in fixing the amount at what it was—it was finally suggested by somebody and strenuously insisted (I think it came from Mr. Morgan perhaps first) that if the capital stock of the North-

ern Securities Company were fixed at any sum very largely below what would be required to purchase the capital stock of the Northern Pacific and Great Northern Companies, it would have an appearance upon its face as of an intention on the part of the gentlemen promoting this company to exclude some of the other stockholders from the benefits, whatever they might be, in the new organization.

(I, 835): "A. The purpose, as I said, in its origin—the only thought that I have ever heard expressed in its origin—in regard to the Northern Securities Company, related to keeping together all the stock of the gentlemen I have named as being those who were consulted. So far as the other stockholders were concerned, comprising the great majority of the stocks of both the Northern Pacific and Great Northern, and comprising the great majority of the stockholders of the Northern Securities Company—those gentlemen were given an opportunity to come in because the other gentlemen who had promoted this company thought it was only right and fair to give every stockholder in the same class with them the same opportunity for whatever advantages (if there were any, which would arise out of the sale of their stock to the Northern Securities Company."

FOURTH.

The conspiracy or combination in question, whether as alleged in the petition or found by the Circuit Court, was not a combination or conspiracy in restraint of interstate commerce, for the only things which the parties thereto combined or conspired to do or procure to be done, were (1) the organization of the Securities Co., and (2) the acquisition by the Securities Co., with their help, of a large majority of the shares of each of the defendant railway companies in exchange for its own shares.

The things so to be done or procured to be done (whether taken separately or together) are such as do not and cannot in any wise restrain interstate commerce, and hence a combination or conspiracy to do them or procure them to be done is not in restraint of interstate commerce.

The Circuit Court erred in holding (1) That the Securities Co., having acquired such majority of shares, has power to suppress competition between the railway companies; (2) that it obtained and holds such power by means of and as a party to the combination or conspiracy, and not as an incident of its ownership of the shares; (3) that the possession of such power to suppress competition is of itself, and irrespective of its exercise, a restraint of interstate commerce; and therefore (4) the combination or conspiracy in question was in restraint of such commerce.

I.

(1) If all the things which the parties to the conspiracy or combination conspired or combined to do or procure to be done would not, when done, restrain commerce, then, most certainly, their combination or conspiracy was not in restraint of commerce. A conspiracy to deprive a man of life or health by means of a wax figure representing him, to be prepared by the conspirators and by them melted before a slow fire, or pierced with knives or pins, would not be, in law, today (however it might have been 300 years ago) a conspiracy to murder or to injure the health of the intended victim. An indictment for such conspiracy as a conspiracy to murder, or a declaration thereon in a civil action for injury to health, with proper averment of damage, would be thrown out by any court. The reason of course is that the things conspired to be done are incapable of injuring the intended victim in any way whatever, and it is quite immaterial that the conspirators thought otherwise, and meant to kill or injure, and supposed they could do so, by the means they conspired to use.

The *agenda* of the parties to the conspiracy in question were the formation of the Securities Co. and its acquisition of the railway shares. The final act, as planned and performed, was and is its acquisition of the last of a great majority of the shares of each of the railway companies.

Hence, if the acquisition and holding of such majority of shares by the Securities Co. is not a re-

straint of interstate commerce within the meaning of the Anti-trust Act, the conspiracy or combination in question here was not a combination or conspiracy in restraint of such commerce, within the meaning of that act.

(2) Taking the Government's case on its own showing, or rather on the perhaps better showing made for it by the Circuit Court, and it amounts to this: Certain persons have combined to organize the Securities Co. and to sell to it, or help it to buy from others, (paying in all cases with its own shares,) a large majority of the shares of two competing railway companies engaged in interstate commerce.

The Government claims and the Circuit Court has held, that the Securities Co. has thereby acquired the power to suppress the competition theretofore existing between the companies; that its possession of such power (irrespective of any exercise of it) is a restraint of the commerce of the railways; and therefore the combination was a combination in restraint of commerce and under the ban of the Anti-trust Act.

It is not alleged or found in terms that this stock ownership by the Securities Co., in and of itself, without farther action on its part, suppresses competition, but merely that such ownership gives the Securities Co. power to suppress. But the possession of this power to suppress is claimed and held to be in itself a suppression—although it would

seem that the exercise of the power must involve a precedent act of intelligence and volition on the part of the Securities Co., without which it will not occur—as, in point of fact, it has not yet occurred.

A pertinent question is, how can this power to suppress competition be exercised? To this there can be but one answer,—by voting for and electing the boards of directors of the railway companies, who conduct their commerce. And the Securities Co., having a majority of the shares of each railway company, and hence a majority of votes, can elect for each railway company such board as it pleases, subject to the statutes which require the membership of each board to be entirely distinct from that of the other.

That is to say, the Securities Co. has the power to suppress competition because of its ownership of the majority of the stock and the voting power which is an incident—and an inseparable incident—of such stock ownership.

And that any power of the Securities Co. to suppress competition has its source in and is an incident of its ownership of a majority of the shares of each railway company, is, in one portion of its decision, expressly conceded by the Circuit Court, which says (II, 1705):

> "The scheme which was thus devised and consummated led inevitably to the following results: First it placed the control of the two roads in the hands of a single person, to-wit, the Securities Co., *by virtue of its ownership* of a large majority of the stock of both companies."

See p. 153 supra

The case then is one where large purchases have resulted in the ownership by one person of a great majority of shares—enough, as the Government says, to give the owner power to suppress competition—that power being only capable of exercise, and being exercised, if at all, by use of the voting power which is an incident of the stock ownership.

Now these matters of stock purchases or exchanges and stock ownership, and the incidents of such ownership, whether the companies are or are not competing for interstate commerce, are not, any more than purchases or exchanges or ownership of other property, matters of interstate commerce, or embraced within the Anti-trust Act. They do not touch in any way the commerce of the companies. This is true whatever the company a majority of whose shares are thus acquired. And this being so where the shares of one railway company only are acquired, it is not easy to see how the purchase of a majority of the shares of two railway companies, though doing (as every railway, great or small, does) interstate business, and though competing with each other for such business, should not be equally apart from interstate commerce and outside of the Anti-trust Act and of the commercial power of Congress, as the purchase of shares of either one of them or the shares of any other company.

That such purchases are outside of the Anti-trust Act has been expressly held by this court in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, where it is said, p. 16:

"Congress did not attempt (by the Anti-trust

> Act) * * * to limit and restrict the rights of corporations created by the states, or of citizens of the states, in the acquisition, or disposition of property, * * * or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted."

[The last clause was, of course, not intended to make the federal jurisdiction over property purchases, etc., depend on their validity under State law].

(3.) It is no answer to this to say that the stock purchases were made and ownership of the shares was acquired by the Securities Co in furtherance of a conspiracy to restrain interstate commerce. This does not alter the fact that in order to suppress competition the alleged power must be exercised, and that such power was not derived from the conspiracy. The ownership of a majority of the shares was obtained from persons not parties to the conspiracy, and the voting power of the shares was created and annexed to them by the charter of the company. This voting power and the right to exercise it is as inseparable an incident of ownership as the right to sell. And neither the right to vote nor the right to sell is in any way conditioned on the source from which or the manner in which the absolute ownership of the shares was obtained.

Undoubtedly if the holder of this voting power conspire with others to restrain interstate commerce by the use of it, such use may be restrained by in-

junction. But no such case is presented here. It is not claimed that the conspiracy charged included the making of such new conspiracy, or that it was part of the conspiracy that the Securities Co. should exercise this power to stifle competition.

The Securities Co., then, must exercise its supposed power to suppress competition before there will be any suppression of it or any restraint of trade. But the defendants did not conspire to cause or procure the Securities Co. to exercise the power. According to the petition and decision the things they were to do ended with the Securities Co's. acquisition of shares. In the use and disposition of them, or of any power incident to the ownership, the Securities Co. and its members were left absolutely untrammelled, and necessarily so, since the acquisition of the great majority of the shares marked the end of the conspiracy.

This conclusion is not weakened by the finding of the Circuit Court (without evidence to support it, as we have already pointed out) that the Securities Co. at its creation became a member of the conspiracy—was born into it. But it is not found that this addition to the combination made any addition to the things which the members of it combined to do. The last act still continued to be the acquisition of a large majority of shares by the Securities Co. And the Circuit Court itself does not hold to the contrary.

And hence it cannot be said that any acts the Securities Co. may do in the way of suppressing com-

petition are acts done in pursuance of the conspiracy, or in carrying out its scheme.

(4) To the authoritative decision quoted from the *E. C. Knight Case*, may be added some additional reasons showing that even if the Securities Co. has the power to suppress competition, still this case is not within the Anti-trust Act.

That act does not define "restraint of commerce." Undoubtedly the common-law criterion is to be adopted in construing the act, though it brushes aside the common-law distinction between lawful and unlawful restraints and makes both kinds illegal and criminal.

"Restraints of trade" at common law were in almost if not quite every case, restraints imposed by a contract or combination upon one or more of the parties to it, the common instances being restraints as to the place of carrying on trade, or as to the amount of trade to be done or the prices to be charged, or as to the use of trade secrets, etc. In each case the restraint was imposed on the person's freedom to carry on his business at his own will, or to carry it on at all. Now, in this case there is no contract between the Securities Co. and anyone else —indeed no contract at all between any parties—requiring either railway company to cease or diminish its competition with the other, nor did the conspiracy or combination in question provide for any such contract.

At common law a cessation or diminution of com-

petition springing from a unity of ownership—as where one competitor sold his business to another, or both sold out to a third person, etc.—was never regarded as a restraint of trade, such cessation or diminution being incident to the union of property or business in one ownership, and not a restraint imposed by contract.

And so such purchases, or agreements to purchase, have never been held contracts in restraint of trade.

In two recent and important cases the validity of such purchases was upheld.

In *Trenton Potteries Co. v. Olyphant*, (1899) 58 N. J. Eq. 507, the court say:

> "A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors."

In *Oakdale Mfg. Co. v. Garst*, (1894) 18 R. I. 484, a number of competing manufacturers of oleomargarine agreed to form a corporation to which they should convey their respective plants, assets and good-will. All this was done, payment being made by the new company in shares of its own stock. The preliminary agreement contained a covenant by each party to it not to engage in any like business for five years. One of them sold his stock, and at once engaged in the oleomargarine business in competition with the corporation, which sued for an injunction.

The covenant and, of course, the preliminary

agreement and the formation of the corporation, and the sales to it for its own shares, were sustained—the covenant as not in unreasonable restraint of trade, and the rest as not in restraint of trade at all.

The court say of the transaction:

> "It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition."

And so this Court, while holding that *every* contract or combination in restraint of trade, whether the restraint be reasonable or unreasonable, is condemned by the Anti-trust law, yet holds that such transactions among competitors as we are considering, though they may suppress competition, are not in restraint of trade, saying:

> "The formation of corporations for business or manufacturing purposes has never to our knowledge been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership." Joint Traffic Ass'n. v. United States, 171 U. S. 505, 567.

That partnership, etc., between competitors must have been meant by the court seems plain. It is hardly conceivable that the counsel to whose argument this declaration is a reply could have suggested or supposed that a partnership between persons not yet in business, or whose business was not competitive, had been declared in the Freight Association Case, then being re-examined, to be in restraint of trade.

And it is almost inconceivable that any other rule should be law among a liberty-loving and a commer-

cial people, especially a people so given as are those of this country to changing from one locality and one business to another, and so requiring and demanding the largest liberty and the widest market for disposing of any business they may wish to relinquish. It seems an absurdity to say that a wholesale merchant in New York, wishing to retire, may not sell out his business to any one of his 25 or 50 or maybe 100 competitors—and this because competition would be thereby lessened; but that he must find, if he can, a purchaser who is a stranger to the trade, or else submit to the delay, expense and loss of a liquidation. And it is equally absurd to say that no two or three of those commercial houses may form a partnership or corporation to take over and own and carry on the business of each one of them; or that an individual, partnership or corporation, whether already existing or formed for the purpose, and whether already in the trade or not, may not lawfully buy the business of any two or three or more of these commercial houses, notwithstanding the suppression or diminution of competition that may ensue.

(5) And the liberty enjoyed by merchants cannot be denied to carriers. The rule of the common law and of the Anti-trust law is uniform and impartial. If the sale of a merchant's property and business does not restrain trade though suppressing competition, neither does a like sale by a carrier.

Take the case of two stage lines, each owned by an

individual, and operated between towns ten miles apart, one in New Hampshire and the other in Vermont. There is a vast difference, it is true, between a ten-mile stage line and a transcontinental railway; but the Anti-trust Act puts them both on the same footing, just as the same law of commercial paper is applied to a note for ten dollars and a note for a million.

Of course any contract between the owners of these stage lines, by which either of them restrains his own freedom of making rates, etc., while still carrying on the business, is a contract in restraint of interstate commerce, and in direct restraint, for it operates directly on the commerce by depriving the carrier of his freedom. Such a contract is clearly a crime under the Anti-trust Act.

But there can be no doubt but that one of the stage-owners may agree to sell his business to the other, and may sell. And the buyer may discontinue one of the lines or may operate both. In the first case competition perishes for want of a competitor. In the second case the buyer has more than all the power attributed to the Securities Co. to suppress competition between the two lines, which the Circuit Court considers the decisive fact in this case.

Instead of a sale by one to the other, the two owners may form a partnership or corporation to which they may transfer the property, business and good will of their respective lines.

Or a third person, or a partnership or corporation

formed for the express purpose, may buy both lines, their property, business and good will.

The actual or potential suppression of competition in these cases would not make the sales or the buyers' ownership in restraint of commerce; nor would the agreements for the sales, or the formation of partnerships or corporations to buy, be contracts, combinations or conspiracies in restraint of interstate commerce.

The reasons of this are not far to seek.

(a) The transactions touch not interstate commerce but property. They are purchases and sales of property—the very transactions which this court, in the passage quoted from the E. C. Knight case, declares not to be in restraint of interstate trade or commerce so as to be forbidden by the Anti-trust Act.

(b) In the various cases supposed, of sales of one or both of the stage lines, etc., resulting in placing both lines, their property, business and goodwill in a single ownership, and a suppression of competition or power to suppress it, this actual or potential suppression of competition is not effected by a contract operating either directly or indirectly on the commerce of the lines, or by any contract at all.

The power to suppress competition—indeed the suppression itself where it takes place—is an incident of the ownership of the property. It is the necessary and inevitable result of the unity of ownership. It is as much an incident of ownership as the right to sell, and is not, any more than the right

to sell, affected by the source of the owner's title.

And because any such suppression is not made by contract but results from the unity of ownership, the agreements to buy and to form partnerships and corporations for that purpose are not contracts or combinations in restraint of commerce, and are not crimes under the Anti-trust Act. The above quotation from the E. C. Knight Case is directly in point.

(c) The only difference between the cases cited and the present is that in those the property itself, and all of it, engaged in interstate commerce was united in the ownership of a single person, firm or corporation, which had direct, immediate and absolute control over the commerce, and power to suppress competition. In this case not the property engaged in commerce—not the two railways—but the shares of stock of the railway companies, and not all of the shares, have passed under a single ownership. And we shall show that the owner—the Securities Co.—has not the power possessed by the buyer of the stage lines to suppress competition; that it has no power at all, and certainly no direct power.

In the cases supposed, the suppression of competition and the power to suppress it are the result of the unity of ownership resulting from the purchases, and are incidents of such ownership. The same is true here, except that the power of the Securities Co. —not a power to act directly on the commerce of the companies, but only to elect directors—is an incident of its ownership of the shares; a voting power inseparably incident to the shares.

(d) In this case as in those supposed, the source of title, the guilt or innocence of the agreements in pursuance of which the shares have been acquired, in no way affect the powers and rights incident to ownership, and which the owner has and exercises by virtue of his ownership.

And the Circuit Court itself, in a passage already quoted, recognizes that the power of suppressing competition which it attributes to the Securities Co., that company has not by reason of the conspiracy or anything done in execution of it, but solely because of its ownership.

(e) Should it be said that in the cases supposed the purchases of the stage lines are made for legitimate purposes, while here there is a conspiracy to suppress competition, the answer is plain. The only question in this regard under the Anti-trust Act is, does the contract or combination itself, or do the things the parties contracted to do, restrain commerce? If they do, the parties are criminals, however good their motives. If they do not, the parties are innocent, however reprehensible their designs. U. S. v. Freight Ass'n., 166 U. S. 290, 341; Addyston Pipe Co. v. United States, 175 U. S. 211, 234.

II.

Power to Suppress Competition not of Itself Suppression.

The Circuit Court's decision rests on the proposition that the power to suppress competition and its actual suppression are identical—an agreement to put into some one's hands the power to restrain commerce is an agreement to restrain commerce. The act must be construed as if it read that "every contract, combination or conspiracy in restraint of commerce, or to put into any one's hands the power to restrain commerce, is hereby declared to be illegal," and is made a crime.

The reasoning which makes the Securities Co. a suppressor of competition because of its power to suppress it, is not unlike that by which the learned Increase Mather proved (to his own satisfaction, at least) that Satan was a principal author of the thunder-storms which terrified the New England people in his day. For, as he says, no one can doubt the power of Satan in such case. He is the prince of the powers of the air, and has full access to all the ingredients from which thunder storms are made, and well knows how to mix and use them; and of his will to do all the harm in his power there can be no doubt.

But Mather's reasoning, though it may provoke a smile today, was sounder than that of the Circuit Court. Even in the case of the arch-enemy of mankind he did not assume that a will to do evil was in-

volved and inherent in the power to do it. His argument does not rest on the mere existence of the power, but he postulates also the existence of an independent will apart from the power.

The Circuit Court's theory of the identity of the potential and the actual smacks of those transcendental metaphysics in which the ego and the non-ego are one, being and not being are the same, "and naught is everything and everything is naught," rather than of the plain common sense of the common law. And thought the adoption of the theory would be a great help to all having notes to pay and contracts or other legal obligations to perform, it has not as yet, so far as we are advised, been adopted into our jurisprudence.

And if adopted it would not help the Government's case; for if the Securities Co. has power to suppress competition, it has equal power to abstain from suppressing it, and of the two courses the latter is the easier and safer. On what ground should the court hold that the Securities Co. suppresses competition because it has power to suppress, rather than hold that it abstains from suppressing because it has power to abstain? Certainly, in this proceeding in equity, the Court should not read backward the ancient rule, and presume that to be done which ought *not* to be done—and because it ought not to be done.

Should it be said that it is for the interest of the two companies that competition be suppressed, and therefore the two boards of directors will join (con-

spire) to suppress it, we ask how can the Court judicially know that such suppression would be even for the pecuniary interest of the companies or would be so considered by the two boards, or by the officers or stockholders of the Securities Co.? And if they think it for their pecuniary interest, how can the Court say that they would set the money thus to be gained above their duty as citizens to obey the laws?—to say nothing of the penalties of the law as a motive to obedience. And is it certain that the railway directors would be such devoted trustees as to risk imprisonment in behalf of the shareholders? And if, as the Circuit Court erroneously holds, the directors are the mere agents of the majority shareholders, where is the presumption that an agent will commit a prison offence at the bidding of his principal? Unless the directors and shareholders of corporations can be differentiated in this respect from the rest of the community, the Circuit Court, in thus holding that they will commit any crime it is within their power and for their interest to commit, has done what Edmund Burke said he could not do—drawn up an indictment against a whole people. If that indictment stands—if its charges are true,—why may not our President well describe us in the language of the Dey of Algiers, to whom an English officer complained of some act of rapine. "Sir, my subjects are a band of robbers and I am their captain."

The extract from an opinion of Judge Lochren, of the same Circuit Court, printed at the end of the discussion of this fourth point, renders superflous

any further refutation of this novel doctrine of his colleagues.

And certainly a criminal statute cannot be amended as required by the decision of the Circuit Court. The words "power to restrain" cannot be substituted for "restraint," the word "restraint" cannot be held to include or to be equivalent to "power to restrain" in the declaratory sentence of section 1, without applying the same treatment to the next following penal sentence. No rule of construction and no practice in construing criminal statutes permits any such dealing with them. This court has refused to read the word "unreasonable" into this statute to narrow its operation, because "no exception or limitation can be added without placing in the act that which has been omitted by Congress." 166 U. S. 290, 329.

Nor can the Court broaden the statute as asked for by the Government without a like unwarranted addition to it, an addition that would also have to be made to every other criminal statute, so that every railway company and every individual would be a perpetual criminal because of their undoubted power to violate one or more criminal statutes.

In the E. C. Knight Case, the American Co., as owning refineries with 98 per cent of all the refining capacity in the United States, and owning their product, sugar, an article that was inevitably destined, in the natural course of things, to enter largely into interstate commerce, had the unquestioned power to control such commerce and to restrain it.

But this court held that such *power* did not amount to a restraint of commerce.

It is apparent how enormously the scope of the act would be widened, what countless agreements would be made criminal, if every contract which, among its other tendencies, has a tendency to restrain interstate trade or empower some one else to do so, or which in its operations results in somebody's acquisition of power to restrain interstate trade or commerce, should be held to be within the Anti-trust Act. There is no reason to suppose that Congress meant any such extension of its already sweeping provisions.

III.

Securities Co. without Power to Suppress Competition.

And even were it conceded that power to suppress competition, is in itself a restraint of commerce, and that a combination to clothe some one with that power is a combination in restraint of commerce, that would not help the Government's case; for even then the combination would still be merely one to make the Securities Co. the owner of a large majority of shares, which ownership, however, would *not* give it power to restrain the commerce of the railways.

This position of the Government rests on a wholly erroneous view of the relations of the shareholders of a railway company to the commerce of the com-

pany, and of the power of a majority of the shareholders to restrain or otherwise control that commerce.

(1) The business of a railway company is managed by the board of directors. Its interstate and other commerce is conducted by the board and by officers, agents and servants appointed by the board. The stockholders do not, still less do the majority of them, carry on any part of the company's business.

But the directors are more than mere managers—mere agents of the corporation. They are its governors, as they are indeed called in some old charters. They are elected, it is true, by the shareholders, just as the governing bodies of a State or the United States are elected directly or indirectly by the people. Like "the Government of the United States," or that of a State, the government of a corporation is strictly representative. The people in the one case and the shareholders in the other do not directly govern. They elect their governors, but have no control over them during their term of office. Members of a State or of the Federal Government cannot be removed by popular vote, but only in the mode constitutionally provided. And so directors cannot be removed by the stockholders, not even for misconduct. To remove them resort must be had to the courts.

And in one respect the governing body of a corporation is farther removed from the shareholders than that of the Union or of a State is from the

people. The latter not only derive their offices from the people, but the office itself is created and its powers conferred by the people in their constitution. But the office of director is not created, nor are its powers conferred by the stockholders. It is created and its powers are conferred by the State, either in its special charter or by the general corporation statute.

Even more, then, than the high officers of the Government elected for fixed terms are the directors of a corporation free from control by their constituents during their term of office.

The difference between the board of directors and mere agents is admirably stated by Judge Comstock in Hoyt v. Thompson, 19 N. Y., 207, 216, as follows:

> "The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds toward his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former. But in corporate bodies the powers of the directors are in a very important sense, original and undelegated. The stockholders do not confer nor can they revoke those powers. They are derivative only in the sense of being received from the State by the act of incorporation."

And see, to the same effect, Burrill v. Nahant Bank, 2 Met. 163, per Shaw, C. J.

(2) The relation of the shareholders of a corporation to its governing board, and their want of control of the operations of the company, is nowhere better stated than by Chief Justice Waite, in

Pullman Car Co. v. *Missouri Pacific Ry. Co.*, 115 U. S. 587.

The Pullman Car Co. had contracted with defendant's predecessor in interest for exclusive use of its cars on the latter's road, and on all roads "controlled" by it. Plaintiff claimed that the contract was binding on defendant, and that defendant had violated it by refusing to allow the use of plaintiff's cars on the railroad of the Iron Mountain Company, nearly all the stock of which company had been acquired and was held by defendant. Assuming the contract to be binding on the defendant, and in answer to plaintiff's claim that defendant by such stock ownership, "controlled" the Iron Mountain road, the Chief Justice says (pp. 596-7):

> "We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old were that company still in existence and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes it own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, *but there the power of that company over the management stops.* The board when elected has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interests, but

that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific.

"It is true the bill avers in many places and in many ways that the purchase of the stock of the St. Louis Iron Mountain and Southern Company was made by the Missouri Pacific Company for the purpose and with the intent of getting the control of the road of the St. Louis, Iron Mountain and Southern, and that the case is before us on demurrer to the bill. A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law. What was actually done is stated clearly and distinctly. The effect of what was done is a question of law, not of fact. It is a matter of no importance what the purpose of the parties was if what they did was not sufficient in law to accomplish what they wanted. When there is doubt, the purpose and intention of the parties may sometimes aid in explaining what was done, but here there is no need of explanation. The Missouri Pacific Company bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is in law not the control itself. *Practically it may control the company, but the company alone controls its road.* In a sense, the stockholders of a corporation own its property, but *they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property.* Such is the case here. This Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. *The directors now control the road through their own agents and executive officers, and these agents and*

officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property." * * *

The foregoing decision of this court and the above quoted opinion of Judge Comstock, and that of Chief Justice Shaw, were pressed upon the Circuit Court at the hearing, and the Pullman Car Co. case is thus disposed of in the opinion (II, 1707):

> "In that case the meaning of the word *controlled*, as used in a private contract, was the point under consideration; and what was said on the subject cannot be held applicable to cases arising under the Anti-trust Act when the point involved is whether the ownership of all" [but the Securities Co. does not own all] "of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does."

Of course, we rely on the decision of this Court, with which we shall not attempt to reconcile that of the Circuit Court.

But assuming them both to be law (for the latter is unreversed) and the relation of a majority shareholder to the corporation and its operations is something like this:

He has no control whenever control will make him liable on a contract.

He has absolute control whenever control will make him a criminal liable to fine and imprisonment.

(3) The charter of each of the railway companies gives to the board of directors all the powers attributed to it by Judge Comstock and Chief Justice Waite. The Northern Pacific directors "are hereby invested with all the powers of the corporation" (I, 412), and the Great Northern charter gives them the conduct of "all the affairs and business of said company," with sole power to make by-laws, etc. (I, 441).

The Northern Securities Co. exhausts its powers as a stockholder in electing a board of directors for each company. They are independent of it and cannot be controlled by it. If it aims to induce them to violate the Anti-trust law, it must do so by persuasion or corruption; it cannot compel.

And it is not only a single body of men that must be corrupted. The Statute of Wisconsin provides:

> "No officer of any railroad corporation shall be an officer of any other railroad corporation which owns or controls a parallel or competing line." (Rev. Stat. 1878, c. 87, §1804).

That of Minnesota provides:

> "Nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line." (Gen. St. 1894, §2717).

The word "officer" in these statutes includes "director," and has always been so construed—as for instance when Mr. Hill, presumably under advice of counsel, resigned from the directorate of the Northern Pacific Co. (I, 24). The powers and duties of the board are but slightly, if at all, legislative. They are executive and administrative, such that the persons performing them are properly called officers.

The foregoing sufficiently exposes the error of the view which the Government seems to have taken in the conduct if not in the inception of this suit, viz: that the Securities Co., as majority stockholder, would hold the directors in its power, could elect the same individuals as directors of both companies, and could turn them out at pleasure (See cross-examination of Col. Clough, I. 841-4).

(4) It is no doubt true that the directors would naturally desire to carry out the wishes of the stockholders in all lawful things—perhaps even to the extent of being in a measure "controlled" by such wishes. But the case is very different where obedience to the wishes—yielding to the control—of a majority of the stockholders means the violation—perhaps a daily violation—of a criminal statute, under which, for each offense, every director is punishable by a $5,000 fine and a year's imprisonment. There is no conclusive nor any presumption that the directors of either railway company, much less the directors of both companies, will violate the Anti-

trust act and risk these penalties by combining to restrain the commerce of the companies or suppressing competition between them. The presumption is the other way. The purchaser of the majority of the shares of a railway company does not buy therewith and own, as an incident of his purchase, the intelligence, the will and the conscience of the directors.

(5) There is nothing in any claim that the Securities Co.'s stock ownership *tends* to a restraint of commerce.

As to "tendency": Undoubtedly, at common law, certain agreements are held void because of their tendency. But this case rests on a statute, and a penal statute. By the first section certain contracts, etc., are declared unlawful, and "every person who shall make any such contract * * * shall be deemed guilty of a misdemeanor." Everything declared unlawful by the first clause is made criminal by the second, and nothing is criminal under the second clause which is not unlawful under the first. The words "or tending to restrain" cannot be read into the declaratory clause, for reading them into that reads them also into the criminal clause.

And, besides, the holding of a majority of shares cannot be said to tend to restrain commerce, when any such restraint requires as a condition precedent the concurrent action of two independent boards of directors to violate a highly penal statute.

Moreover, conspiracies and acts which "tend" to

restrain commerce are conspiracies and acts which do not actually reach it and restrain it. Hence acts which merely *tend* to restrain interstate commerce are not within the regulative power of Congress. Otherwise the *E. C. Knight Case* would have been differently decided.

(6) Since the Securities Co., no matter how large its holding of stock in the two railway companies, cannot by reason or by means of such holding, or without debauching two boards of directors to violate the Anti-trust act and incur its penalties, restrain the interstate commerce of either railway, it necessarily follows that the holding of a majority of the shares of each railway company by the Securities Co. does not restrain such commerce; and does not make the Securities Co. a combination in restraint of interstate commerce; and that a combination or conspiracy to form the Securities Co., and transfer to it a majority of the shares of the two railway companies, is not a combination or conspiracy in restraint of their interstate commerce; and therefore that no conspiracy or combination to restrain interstate commerce is either alleged in the petition or shown by the evidence.

Of course, if the Securities Co. should hereafter conspire or combine with directors of one or both of the railway companies to restrain their commerce by suppressing competition or by other means, or if the directors of the railway companies should make such a combination or conspiracy with-

out the Securities Co., in either of these cases the Government could restrain the carrying out of the conspiracy and punish the conspirators. But until the Securities Co. engages in some such conspiracy or combination—and no charge or claim is made that it contemplates anything of the kind—it is in no way under the ban of the Anti-trust act.

IV.

Judge Lochren's Decision.

The positions of the Circuit Court in those portions of the decision that have been discussed under this our fourth point, could not receive a sounder or more destructive criticism than they have been subjected to by Judge Lochren of the same court, in the case of State of Minnesota v. Northern Securities Co. (123 Fed. Rep. 692), in which the decision now under review was pressed upon him as an authority to be followed. In the course of an opinion of marked ability and independence of outside influences, Judge Lochren says on this point:

> "The decision of the case last cited (i. e. State v. Securities Co.) as I read it and understand it, does not specify or point out any contract, agreement or act on the part of the defendants, or of any of them, which is directly in restraint of trade or commerce, or which has any direct reference to trade, commerce, transportation or rates; nor even any threat or avowed purpose on the part of any defendant to do any such act, or enter into any such contract or agreement.'
>
> "It is argued that because the Northern Se-

curities Company has become the owner of a large majority of the stock of each of the two railroad corporations, it will be for its interests to suppress competition between them, by causing the two boards of directors of these railroad corporations, which it can fill by election, to enter into arrangements or agreements in restraint of trade which will suppress competition; and as a corollary to this reasoning (or conjecture) the decision holds that the formation of the Northern Securities Company and purchase by it of a majority of the stock of each of these railroad companies are acts or contracts in restraint of trade, though of themselves, and without further action (not yet taken, and perhaps never to be taken) by the directors of the two railroad companies, the formation of the Northern Securities Company and its holdings of stock have and can have nothing to do directly or indirectly with trade, commerce, transportation or rates.

"To epitomize this decision: It is held that it will be for the interest of the Northern Securities Company to restrain trade by suppressing competition between these two railroads, and that by coercing or persuading the two boards of directors whom it has the power to elect, it will certainly cause them to commit highly penal offenses by entering into combinations, contracts and arrangements in restraint of trade, in violation of the Anti-trust Act, and hence the Northern Securities Company is already guilty of these offenses that have never been committed or thought of by its officers or promoters, so far as appears, and it must be suppressed or destroyed.

"I am compelled to reject the doctrine that any person can be held to have committed, or to be purposing and about to commit a highly penal offense, merely because it can be shown that his pecuniary interests will be thereby advanced, and that he has the power, either directly or indirectly through persuasion or coercion of his agents, to compass the commission of the offense."

FIFTH.

The Petition does not allege, nor do the Proofs disclose, any facts showing a Monopoly or a conspiracy or attempt to monopolize, any Interstate or Foreign Commerce.

A monopoly of interstate commerce, however it be defined, is but one form or species of restraint imposed thereon—a species which Congress, in the second section of the Anti-trust Act, has segregated from other kinds of restraint and subjected to special provisions.

And therefore what has been said under the foregoing points to the effect that the Securities Co's. holding of the majority of the shares of the two railway companies does not restrain commerce or suppress competition, or give that company power to do either, is equally applicable in reference to the charge of monopoly. If such holding does not restrain commerce at all, it does not monopolize commerce, monopoly being but one sort of restraint.

And so what will be said under the following (sixth) point, to the effect that even though the Securities Co's. holding should restrain commerce, yet it does not *directly* restrain it, and hence is not forbidden by the Anti-trust Act, applies with full force to the subject of monopoly, for a monopolizing like any other restraint of commerce must be direct to be within the act.

I.

In the primary meaning of the word, a monopolist is one who has the exclusive sale of a thing. And in law a monopolist is one who has the exclusive right to carry on a business, etc., under a franchise which prohibits others from engaging in it. And so a patent or a copyright confers a true monopoly. And an exclusive franchise for a bridge, a ferry or a railway within a defined territory creates a monopoly within that territory.

In popular, and sometimes even in judicial speech, one is said to monopolize a thing when he possesses all of it. A man who carries on all the trade of a certain class in a town or city is said to monopolize it. And so it has been said in this Court: "From the very nature of the case, therefore, railroads are monopolies." (Per Shiras, J., in *Texas & Pacific Ry. v. Interstate Commerce Com'rs*, 162 U. S. 197, 210). "It is true that as to a majority of those living along its line a railway is a monopoly." (Per Peckham, J., in *U. S.* v. *Freight Ass'n.*, 166 U. S. 290, 335). "Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines." (Per Brown, J., in *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 676). Elsewhere in the last-cited case, Mr. Justice Brown uses the word in the same sense, when he speaks of the monopoly of the railway traffic in northern Minnesota, should the Great North-

ern Co. become owner of the stock of the Northern Pacific Co., or be consolidated with it.

In none of these cases were the remarks in regard to the monopoly of railways necessary to the decision, nor any part of the reasoning on which the decision was based. Thus in the last case there were two questions. The first was whether a statute of Minnesota forbidding a railway company to own stock in a competing company was inoperative as to a projected purchase of Northern Pacific stock by the Great Northern Co. because of a provision in the latter company's charter (earlier than the statute) empowering it to own stock in other companies. The second was whether the particular transaction in question was a purchase by the Great Northern Co. itself, or a purchase by its stockholders.

It is obvious that the questions whether the charter provision was a contract, and, if it were, whether the subsequent statute impaired its obligation, and whether the proposed purchaser was the company or its stockholders, must have been decided in the same way whether railways are or are not monopolies, and whether a purchase of the Northern Pacific shares by the Great Northern would or would not monopolize traffic.

In none of these cases was the Court called on to give a legal definition of monopoly, the cases did not turn on any question of monopoly, the attention of the Court was not directed to the difference between a monopoly in common parlance and a monopoly in law. The former was what was in the mind of

the Court, and so the word was used in its common and not its technical meaning.

And the same is true of many cases that might (and perhaps will) be cited, where courts have used the word under like circumstances in this popular sense.

And in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, it being argued for the Government that a monopoly of interstate commerce would be created, the Court says (p. 10) that "the conclusion *to be assumed* on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life," and then goes on to consider and decide the case *on this assumption*, and without deciding or even considering (it was unnecessary to do either) whether there was any monopoly or not, for, if there were, it was of manufacturing and not of interstate commerce.

A definition of monopoly that would make all railway operation criminal could hardly have been that in the mind of Congress when it penalized, in the second section of the act, all monopolizing and attempts or conspiracies to monopolize—and this though Congress was doubtless not ignorant of the widely published fact that the railways of the country, and notably those of the Northwest, have for years been engaged in a persistent attempt to ruin the producers along the lines by carrying their products at lower rates and furnishing better facilities therefor than can be had in any other country on the face of the earth—an attempt so far successful that the lands of these same producers bring

only four or five times the price they would have brought half a dozen years ago.

II.

In the Circuit Court, the counsel for the Government, in their brief and argument, defined monopoly as

> "the concentration, in the hands of one or a few, of a business or employment theretofore in the hands of several, so as to control competition."

And just as they had argued that the power to restrain trade was in itself a restraint, so they contended that the possession of power to monopolize is itself a monopolizing. On this subject we refer to what is said under our last (fourth) point without repeating it.

The definition quoted assumes that the business concentrated is competitive, otherwise the effect would not be to control competition. And so, in the petition, the only basis of the charge of monopolizing made against the Securities Co. is that it has acquired a majority of the shares of each railway company, and thereby the control of the competitive interstate commerce of both.

There is no ground for holding that the Securities Co. monopolizes, or has conspired or attempted or is conspiring or attempting to monopolize commerce, even though this or any like definition of monopoly be accepted.

It has no control of the commerce of either rail-

way company, and hence no control of their competition. This has already been shown under our last (fourth) point.

The monopolizing denounced by the act is a monopolizing of trade or commerce *by persons engaged in either of them*. The acquisition and ownership of property—in this instance railway shares—not the subject of interstate trade or commerce, is not a monopolizing, nor within the Anti-trust Act, even though such acquisition and ownership should put it in the owner's power to monopolize, or otherwise control or restrain interstate commerce.

And any power that might exist, in such case, to monopolize commerce, whether by controlling competition or in any other way, would be simply an incident of a purchase and ownership of property—a purchase made and ownership held by virtue of rights which Congress, even if it had the power to do so, has not attempted, in the Anti-trust Act, to limit or control. That act becomes operative on the owner of the stock when (and not until) he attempts or conspires to monopolize commerce, whether by using his property for that purpose, or by other means.

This definition does not come quite so close as the former to making the Anti-trust law an enactment of Proudhon's "property is robbery," but comes perilously near it. For if this is the monopoly meant by the act when it penalizes the monopolizing or attempt to monopolize "*any part*" of trade or commerce among the states, many of the common-

est business transactions are made criminal, and shackles are placed upon the freedom of trade and commerce far heavier than any monopolies impose.

Take the illustration heretofore given of one of 25 or 50 merchants engaged in interstate trade, and competitors, selling out to another, or the two forming a partnership or corporation, or both selling to an individual, a partnership, or a corporation.

Or take the case of the little 10-mile stage lines, and the various transactions instanced.

Now this definition of monopoly would make every one of these transactions criminal, and the result of them also criminal, because "a concentration in the hands of one or a few of a business theretofore in the hands of several, so as to control the competition theretofore existing among them," and so a monopoly of "a part"—however small a part—of interstate trade or commerce.

The claim of this or any like definition to express what Congress meant by monopolize, may be further tested by the following transactions, every one of which were or are criminal under this definition:

Before the days of railways there was a great interstate commerce by coach and wagon on the highways between the different States—for instance between Boston and Albany, Boston and New York, on the great Cumberland Road, etc. Enterprising and far-seeing men—the Hills and Morgans of those days—projected railways for the express purpose of acquiring the commerce so carried on by horses, and acquiring the whole of it, for the railway must

necessarily take it all, and could not prosper with less than all. They built the railways, drove the coach and wagon-carriers out of all interstate commerce, acquired—monopolized—it all. They were regarded at the time and have been regarded since as public benefactors, who had rendered inestimable service to the commerce of the country. Had this Anti-trust act been then in force would they have been criminals for monopolizing interstate commerce *which had theretofore been competitive?*

Should it be said that their acts, though otherwise criminal, were protected by state charters, the answer is plain and is furnished by the Circuit Court (II. 1708;) in its negative response to the question put by it, "Whether a charter granted by a state can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce, over which Congress has absolute control." Indeed, those men, by getting a state charter and acting under color of it, would, according to the Government and the Circuit Court, be doubly guilty—guilty of violating the act of Congress and guilty of procuring the state to violate the Federal Constitution—making it a partner in their illegalities if not in their crime.

Other instances readily suggest themselves:

Two shopkeepers in competition with each other do all the business in a small town. The business falls away, owing to the decay of the town or for any other reason, until there is not enough to support both shops. One of them must close or both must. They agree that one shall retire and sell his

business to the other, who thereby has all the trade —"monopolizes" the *formerly competitive* trade of the town. Now does the purchaser monopolize the trade he has thus acquired, in the sense which that word bears in the Anti-trust Act? If the business thus dealt with included interstate trade, would he, under that act, be a criminal?

Although no single dealer monopolizes all the interstate trade of any city, each has exclusive possession of the part he has secured to himself—monopolizes that part. Each enterprising merchant aims and bends all his energies to enlarge his business to the fullest extent. By larger capital and superior business capacity one such merchant is able to and does continually encroach on the business of his rivals until he acquires nearly all or all of it. He does to other merchants in interstate trade what the department store does to small retailers. Does he "monopolize" the interstate trade he has thus acquired, and is he a criminal, according to the Anti-trust act?

In all these instances, whether of carriers or traders,—and in the instances before cited of merchants or stage-line owners selling out to one another or to third prsons or uniting in partnerships or corporations,—the individual or company which has thus acquired exclusive possession of a certain portion of the interstate commerce or trade of the country, *competitive or non-competitive*, is just as fully a violator of the Anti-trust law as the Northern Securities Co. could be if it actually con-

trolled and operated the two defendant railway companies and their railways.

And these instances are enough to show that the Anti-trust act is not violated—interstate trade or commerce is not, nor is any part of it, monopolized, within the meaning of the act—by the mere acquisition and exercise of exclusive control of some portion of the interstate trade or commerce of the country, *whether competitive or non-competitive.*

In the words of Judge Ricks:

> "If these acts are illegal and in restraint of trade, and if they constitute a monopoly under this act, it may well be denominated an act to restrain legitimate enterprise, and limit and qualify the ownership in property."
>
> *In re Corning*, 51 Fed. Rep. 205, 211.

This Court has not, in any of the cases under the Anti-trust act, settled the meaning of the word monopolize as used in that act. But in *Addyston Pipe Co. v. United States*, 175 U. S. 211, monopolizing was (as in this case) a principal charge, though coupled with restraint of trade. A "monopolizing," or "conspiracy to monopolize" in the sense against which we contend, was clearly made out. But the court disregarded that charge, and held the contract and combination simply to be in restraint of trade, which would seem to indicate that the court did not consider the word "monopolize" to include even such cases as that.

III.

The true criterion of a monopoly of trade or commerce is thus stated by Circuit Judge Sanborn in *U. S. v. Trans-Missouri Freight Assn'n.*, 68 Fed. 58; 7 C. C. A. 15:

> "A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to or the exclusive control of the trade; and (2) the exclusion of all others from that right and control."

The learned judge cites *In re Greene*, 52 Fed. Rep. 103, 115, where Justice Jackson, of this Court, then a Circuit Judge, says, in an opinion the whole of which should be read:

> "An 'attempt to monopolize' any part of the trade or commerce among the states must be an attempt to secure or acquire an exclusive right to such trade or commerce by means which prevent or restrain others from engaging therein."

And in *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, the Supreme Court of Rhode Island says:

> "Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for a mutual advantage which do not amount to a monopoly, but leave the field open to others, are neither within the reason nor the operation of the rule."

But the so-called "control" of the two railway companies and their interstate commerce by the Securities Co. does not preclude any other railway company, existing or to be formed, from engaging in such commerce in competition with them. Be-

fore the formation of the Securities Co. it was open to any persons desiring to compete for such commerce to form a company to do so, and it is equally open to them since the organization of the Securities Co. The policy of free trade in railway construction and operation has at all times held full sway in all the states through which these railways extend. The ten-years' "monopoly" of the Northern Pacific did not preclude the Great Northern from building a rival line to Puget Sound. And there is no pretence that the defendant railway companies or the Securities Co. have placed, or intend to or will place, any obstacle in the way of such construction of rival lines; or that they have any greater power or means of obstructing the building of any competing line than the railway companies themselves had before the Securities Co. was formed.

Within the definitions of Justice Jackson, Judge Sanborn and the Supreme Court of Rhode Island, this record discloses no violation of the second section of the act.

On a plain common-sense view of the situation all these charges of monopoly and suppression of competition—huge as be their dimensions—have little if any substance. Much has been said in the Circuit Court, and many cases were cited, about monopolies being against public policy, and about competition being required by that policy. But when as in this case the whole subject is regulated by statutes, there is no public policy outside the statutes. And even at common law there was no

policy requiring any body to compete. True, a man could not bind himself not to compete, just as he could not restrict his freedom of trade in other respects, and for the same reason; he must be left free to compete or not.

The policy of the Statute—the Interstate Commerce Law—is that railways shall not compete, shall not use any of the many arts and methods by which one trader gets business away from another, for this is competition. The railway must not give better terms or greater favors to one shipper than to another. It can only charge a rate that has been and is kept published, open to all the world. A reduction of rates may well be made by two companies, not in the interest of one as against the other, but to develop some particular traffic or section of country for the benefit of both. But this is not competition. Suppose that one company wishes to get business away from another by reducing rates. His reduced rates must be published three days before they can be put in force. Its competitor at once knows of the reduced rate as soon as published and at once reduces its own. The first has had the benefit of any increased traffic by reason of the reduction for one or two days, hardly long enough for the reduction to become generally known. After the three days it simply has to carry at the reduced rate, with no better chance of getting business away from its rival than it had before the reduction. It is worse off—both are worse off—than before. Hence there is no inducement for any company to reduce rates as a matter of competition.

or otherwise than in concert with its so-called "competitor," to help the business of both.

However the Interstate Commerce law may have failed to meet some of the objects of its authors, it could not be more effective to destroy railway competition. No company has any interest to compete (as that word is understood in ordinary trade) unless it be to engage in what has been called "piratical competition"—competition of a strong road against a weak by reducing rates to a point where the latter is sure to be ruined whether it meets the reductions or goes without business by not doing so. The outcome being that the strong road directly or indirectly acquires the weak either by a forced arrangement of some sort or by a purchase at a receiver's sale,—perhaps at a sacrifice great enough to save it from the necessity of compelling the public to make good its losses in the competition.

And so railway consolidations, or railway "mergers," do not restrain or control any but a fictitious or "piratical" competition. And that they are a public benefit we have the statement of Interstate Commerce Commissioner Prouty at the examination of Mr. Harriman (I, 644:)

> "I think as you do that unless these consolidations and unifications result in the over capitalization of our railroads, they are good for the country and a good thing for the carriers," even though they may sometimes impose on the public an unjust rate.

Now, it would be a hard thing to say of public policy or of the law that it favors any such piratical

competition as has been described. And looking at facts as they are, and not as they were before the Interstate Commerce act, it must be conceded that ordinary fair competition—such competition as obtains between merchants or ship-owners—is not today the policy of the law as to railway companies, nor does the statute permit such competition, nor does it exist.

In the examination of Mr. Harriman, it was stated by Mr. Prouty of the Interstate Commerce Commission: "You know, Mr. Harriman, that competing rates have to be practically the same between the same points." (I, 642, and see supra, p. 105.)

And it appears in evidence that the rates to and from all points on the road of either company and points on the line of any other railway are the result, not of an agreement, (which would be criminal,) but of acquiescence on the part of a very large number of companies, each one "competing" with some if not all of the others. See the "Westbound Tariff", Deft's. Exhibit 5. (I, 965.)

And when it is considered that of the so-called competitive commerce of these railways, the Securities Co., if it has the power to control competition or rates at all, can control the rates or the competition on only 3 per cent of that commerce, (supra, pp. 106-8) it must be conceded that the Circuit Court's picture of the Securities Co.'s power over competition, and of the stifling of competition, is to say the least, overdrawn.

SIXTH.

This case is not within the Anti-trust act, for in any view of the matters complained of, their effect upon commerce—whether much or little, for good or ill—is indirect and remote. The Anti-trust act and the regulative power of Congress under the commerce clause of the Constitution are alike strictly confined to matters which directly and immediately affect interstate or foreign commerce.

Assuming that the promoters of the Securities Co. combined, as the Circuit Court says, with a view to having it obtain by purchase and exchange a majority of the shares of both railway companies, (and not of the Northern Pacific alone, as shown under our third point,) and that the mere ownership of the shares thus acquired operates as a restraint of, or gives it power to restrain, the interstate commerce of the two roads, (and that it does not is shown under our fourth point,) then we submit that any such restraint of commerce is not a *direct* restraint, nor is the combination or conspiracy found by the Circuit Court a combination or conspiracy in *direct* restraint of commerce.

That the Anti-trust act is so limited to combinations, etc., in *direct* restraint of commerce has been reiterated by this Court, and with increasing emphasis, in each successive case under the act that has been decided by it.

In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, it was claimed by the United States that the so-called Sugar Trust was a combination in restraint of and to monopolize interstate commerce, because of its monopoly of the manufacture of sugar, a necessary of life, used throughout the United States, so that the manufacture must to a moral certainty be followed by shipments by the Trust to other states, or sales for shipment to other states. But the court *held* that an *inevitable* tendency to such result did not make the Trust a combination or conspiracy to restrain or monopolize interstate commerce, since its effect on such commerce, *however inevitable*, would be *indirect* only.

And it would be indirect because the manufacture of sugar was not and did not touch (any more than the acquisition of railway shares) interstate commerce; that besides the manufacture, one of two other things had to be done, each involving the exercise of volition on the part of one or more persons, before interstate commerce could be affected—that is, the sugar must be shipped to another state by the Trust itself on its own account, or be sold or contracted for shipment to another state.

And so in this case, the alleged conspiracy could not affect interstate commerce until after (1) the Securities Co. had acquired a majority of stock of both railway companies by the voluntary acts of the Great Northern shareholders in transferring their shares to it—they not being parties to the conspiracy; nor until after (2) the boards of directors of the two railway companies should have taken the

action required to restrain their competitive commerce; action which the conspirators did not conspire to take or to have taken; action which the directors alone had power to take, and which action alone could act *directly* on their commerce.

Upon the points here involved, the Court, by the Chief Justice, says:

> "The argument is that *the power to control* the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government, in the exercise of the power to regulate commerce, may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly."
>
> (p. 13). "It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly *directly* may be exercised by the general government whenever interstate or international commerce may be *ultimately* affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police."
>
> (p. 15). "In *Gibbons v. Ogden*, *Brown v. Maryland* and other cases often cited, the state laws, which were held inoperative, were instances of *direct* interference with interstate or international commerce; yet in *Kidd v.*

Pearson the refusal of a State to allow articles to be manufactured within her borders even for export was held not to *directly* affect external commerce; and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was *not direct.*

(p. 16). "Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably *tend* to restrain external as well as domestic trade, but the restraint would be an *indirect* result, however *inevitable* and whatever its extent; and such result would not necesarily determine the object of the contract, combination, or conspiracy."

(p. 16.) "It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; *or to limit and restrict the rights of corporations created by the States or citizens of the States in the acquisition, control, or disposition of property;* or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; *or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted.*"

In *U. S. v. Freight Ass'n.*, 166 U. S. 291, as well as in *Joint Traffic Ass'n. v. United States*, 171 U. S., 505, the contracts challenged were executory agreements, made between railway companies to regulate their competitive interstate commerce, and in terms restrained—indeed, took away—the independent rate-making power of each company.

Each contract was therefore in its terms and in the making of it a *direct* restraint of interstate commerce, since it operated by its own force, as soon as made, to restrain or destroy the freedom of each party to it in carrying on such commerce.

And the Court holds each contract unlawful because in terms, and by its *direct*, *immediate* and *necessary* effect it imposes such restraint, and holds also that if such restraint were not the *direct* effect of the contract, the contract would be lawful.

In the first case (166 U. S. 291), the Court says, by Mr. Justice Peckham:

> (p. 313). "An act which prohibits the making of *every* contract, etc., in restraint of trade or commerce among the several States, would seem to cover by such language a contract between competing railroads, and relating to traffic rates for the transportation of articles of commerce between the states, *provided* such contract *by its direct effect* produces a restraint of trade or commerce.
>
> (p. 341-2). "While in force, and assuming it to be lived up to, there can be no doubt that its *direct*, *immediate* and *necessary* effect is to put a restraint upon trade or commerce as described in the act.

It will be observed that the Court recognizes that even a contract between competing railway companies, relating to rates for interstate commerce, may be of such a nature as to restrain such commerce only indirectly, and so be valid.

In *Joint Traffic Ass'n. v. United States*, 171 U. S., 505, the Court, by the same Justice, after stating

the terms and effect of the agreement in question, says:

> (p. 568). "In Hopkins v. U. S. (171 U. S. 578), decided at this term, we say (p. 592) *that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce*, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. *The effect upon interstate commerce must not be indirect or incidental only.*
>
> "We also repeat what is said in the case above cited, (171 U. S. 600) that, 'The act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce and possibly to restrain it."

Each of the cases of *Hopkins v. United States*, 171 U. S. 578, and *Anderson v. United States*, Id. 604, was the case of a live-stock exchange in Kansas City, in each of which the Exchange, though it did no trading itself, imposed various restraints upon the commerce of its members—such as a prohibition to employ agents to solicit consignments, except at a stipulated salary, or to send prepaid telegrams giving information as to the market. In the first case the members did an exclusively commission business, in the second they traded on their own account. In both cases the cattle dealt in came largely from other states.

In the first case the court says, by the same Justice:

> (p. 587). "We come therefore to the inquiry as to the nature of the business or occupation that the defendants are engaged in. Is it interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all does so only in an indirect and incidental manner?"
>
> (p. 591). "Even all agreements among buyers of cattle from other states are not necessarily a violation of the act, *although such agreements may undoubtedly affect that commerce.*"
>
> (p. 592). (Passages quoted in Joint-Traffic Case).

(p. 594). After instancing combinations affecting transportation—among others one of engineers, firemen and trainmen not to work for less than specified wages, and asking would any of these "be illegal because the cost of transporting interstate freight would be thereby enhanced?" the Court says:

> "In our opinion these queries should be answered in the negative. The indirect effect of the agreements might be to enhance the cost of marketing the cattle, but the agreements themselves would not necessarily for that reason be in restraint of interstate trade or commerce."
>
> (p. 599). "An agreement among business men not to send telegrams in regard to their business in certain contingencies, when the agreement is entered into only for the purpose of regulating the business of the individuals, is not a *direct* attempt to affect the business of

the telegraph companies, and has no *direct* effect thereon."

(p. 600). (Passage quoted in Joint Traffic Case, *supra*).

The decision in the *Anderson Case* is in strict accord with that in the *Hopkins Case*.

Addyston Pipe Co. v. United States, 175 U. S. 211, was the case of a combination of manufacturers, each doing business in several states in competition with the others. The agreement by its terms took away from each party to it the right to compete for business except in territory and at rates regulated by the agreement.

In holding the combination a violation of the Anti-trust law, the court, again by the same Justice, says:

(p. 229). "We think * * that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizens from entering into those private contracts which *directly* and substantially, *and not merely indirectly*, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."

"While unfriendly or discriminating legislation of the several States may have been the chief cause for granting to Congress the sole power to regulate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would *directly and substantially and not as a mere incident*, regulate interstate commerce."

(p. 234). "If the *necessary*, *direct* and *im-*

mediate effect of the contract be to violate an act of Congress *and also* to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a *direct* and *substantial* regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed. Where the contract affects interstate commerce only *incidentally* and not *directly*, the fact that it was not designed or intended to affect such commerce is simply an *additional reason* for holding the contract *valid* and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and *directly* affecting, and more or less regulating, interstate commerce is of no importance.

(p. 234). "We conclude that the plain language of the grant to Congress of *power to regulate commerce among the several States* includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which *directly* affect and regulate that commerce. * * *

"We are thus brought to the question whether the contract or combination proved in this case is one which is either a *direct* restraint or a regulation of commerce among the several States or with foreign nations contrary to the act of Congress."

And the court holds, upon a review of the facts, that such was the character of the combination, adding that, in determining the effect of a combination,

(p. 245). "All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether

the *necessary effect* of the combination is to restrain interstate commerce."

II.

In none of the foregoing cases has the Court defined the words "direct" and "directly"—probably because their meaning is so plain, as will appear from the following:

What is a combination in direct restraint of commerce?

For answer we repeat what is said supra, p. 133, in commenting on the Act:

> "To constitute a combination in direct restraint of interstate commerce, the parties must combine to do acts which, if performed, *will of themselves restrain* such commerce, and will *directly* restrain it—that is, acts which *operate directly on such commerce*.
>
> "If the acts which the parties combine to do fall short of this, if they are not such as *operate directly* on the commerce, and by such operation *directly* restrain it, then the combination is not within the Act."

And when the acts to be done operate in the first instance and directly on something other than commerce, (as on the company's property,) though the effect of such operation be so transmitted as to reach commerce, such acts affect commerce only *indirectly*.

Thus the contracts in the Freight Association Case, the Joint Traffic Case and the Addyston Pipe Case acted directly on commerce—restrained the liberty of each party to them by the mere making of

them. A probable result of the contracts would be a raising of rates or prices.

But a combination of railway engineers, firemen and trainmen to get better wages, though it accomplish the purposes of its formation in raising wages, does not operate *directly* and of its own force on the commerce of the railroad, by raising rates or otherwise. True, rates may be and very likely will be raised as a consequence of a rise in wages, just as they might be in consequence of a rise in fuel and supplies, the result of a combination among dealers. But in either case, the combination does not strike *directly* at the rates—*does not reach* the rates. Between the end of the work of the combination and the raising of rates must come the independent action of the directors of the company before rates can be affected. Hence such a combination of wage-earners is not within the Anti-trust Act. *Hopkins v. United States*, 171 U. S. 578, 594.

Though the increased cost of labor and supplies consequent on and caused by the combinations be regarded as a cause of the increase in rates, it is not the proximate cause. And it may not be wholly inaccurate to say that a contract or conspiracy is in direct restraint of commerce only when the doing of the acts which the parties contract or conspire to do will be the proximate cause of a restraint of commerce.

The distinction between direct and indirect regulations of commerce becomes important in those cases where the power of Congress to regulate di-

rectly is exclusive, and the question is on a state statute charged with encroaching on that power. And the cases hold that

A state may not tax railway earnings from transportation as such, for that is taxing the commerce and is a direct regulation of it.

Fargo v. Michigan, 121 U. S. 230.

Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326, 338.

But it may tax the same money received from transportation (provided it is taxed as money and not as earnings) or any property that may have been bought with it, and, in fact, all the railway company's property in the state, whether used in trnsportation or not.

In the two cases, should the receipts from transportation be on hand, either in cash or in property bought, when the tax is levied, the effect on the company would be the same—so much money would be taken from its treasury by taxation of moneys that had been earned by transportation.

But the difference is that in one case the tax, *being laid on the commerce*, is a *direct* regulation of it. In the other case the tax is laid primarily on property, and if it operates at all on commerce to regulate it, does so indirectly.

And though a state may not tax earnings from interstate traffic, it may tax the tolls received by a local railroad company for the use of part of its road by another company engaged in interstate commerce; for this is a tax on property and not on

commerce. Any increase of rates by the carrying company consequent on a raising of the tolls because of the tax is "too remote and indirect" to make the act a regulation of commerce.

Erie R. R. v. Pennsylvania, 158 U. S. 431.

This is the same distinction between property and commerce on which we have all along insisted.

A state may tax the franchise of a foreign corporation upon a valuation measured by gross receipts from interstate and foreign as well as domestic commerce. This is not a *direct* regulation; the tax is not laid *on the commerce itself.*

Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

So a law imposing a privilege tax of $50 on every sleeping car running over the railroads of the state is void as to cars used in interstate transportation, for it is a *direct* regulation of commerce.

Pickard v. Pullman Southern Car Co., 117 U. S. 34.

But the state might tax the same cars, not (as in the Pickard Case) because used in commerce, but because within the state—as property in the state; and the tax may take the form of a tax on the company's capital. Here the tax is laid *directly* on *the property* of the company—its cars—and *not on the use* of the cars in interstate commerce, and if it regulates such commerce at all, does so *indirectly.*

Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 25.

And so with the taxation of other property.

A state may not tax United States bonds as such. It may not tax an individual or corporation on the value of the bonds held by him, for this would be to tax the bonds *directly*. But shares in a national bank are taxable by a state at their full value like other property, no matter how much of the bank's capital is invested in United States bonds. Such tax does not fall *directly* on the bonds. Van Allen v. Assessors, 3 Wall .573, where the majority of the court held that the tax did not fall on the bonds at all, the minority that it did, though *indirectly*.

In the Circuit Court, it was argued for the Government:

1. "Direct means in a straight line. It don't mean to touch or come in actual contact with. It means legislation which is in the direct or straight line of commerce."

But *direct* legislation on commerce is something quite different from this. And as to the "straight line," a cannon-ball shot at a target and striking and smashing it, strikes it *directly* and not indirectly, whatever its trajectory.

2. The action of shareholders in choosing directors is "directly related to commerce."

3. If Mr. Morgan bought the railways, and thus gained power to suppress competition, "such a purchase would have a direct relation to commerce."

4. But no one can buy a railway. The stock only can be bought. Only by buying the stock of the companies could he get the power of suppressing competition, and if he bought the stock he would have the same power as if he purchased the railways, and hence his power "relates just as directly to commerce" as if he bought and took actual possession of the roads and rolling stock.

These positions have already been fully answered under our fourth point.

III.

(1). In all these declarations of the limitations of the Act and of the power of Congress, the court has merely repeated what has always been its settled doctrine.

Matters which affect interstate or foreign commerce, whether by way of regulation or otherwise, (excluding those of merely local concern) fall naturally into two classes—those whose effect is direct and immediate, and those whose effect is indirect and mediate or remote.

Those whose effect is direct and immediate are within the regulative power of Congress. Those whose effects are not direct and immediate are without the limits of that power. Their regulation is for the States; and whether the States regulate them or not, whether the States permit, proscribe or ignore them, in no way affects the impotence of Congress to regulate them. And the power of Con-

gress under the Commerce Clause is confined to direct regulation.

The reason of this restriction on the power of Congress is this: If Congress could indirectly regulate interstate commerce, there would be no limit to the distance it might go from direct regulation; and as there is hardly any transaction of any magnitude, hardly any state legislation (—even the laws and their machinery for protection of property, authorizing and regulating the business of insurance, providing judicial remedies upon contracts, including contracts involving interstate trade, and countless others—) that does not in an indirect or remote way affect interstate commerce, pretty nearly the whole internal government of the States would be displaced by or made subordinate to Congressional regulations. As held in *Hooper v. California*, 155 U. S. 648, 655 per White, J.:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."
>
> (Quoted with approval by the Chief Justice in *Williams v. Fears*, 179 U. S., 270, 278, which was a case of a tax on agents employed in hiring laborers to be employed beyond the limits of the State).

(2). The grant of power to Congress is "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The accepted definition of interstate commerce, early made and often repeated, is thus stated in *Addyston Pipe Co. v. United States*, 175 U. S., 211, 241:

> "Interstate commerce consists of intercourse and traffic between the states or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but the purchase, sale and exchange of commodities." *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241.

As incidental to the power to regulate commerce, Congress may pass all laws necessary or proper to carry that power to effect, and within wide limits Congress is the judge of such necessity or propriety.

In the exercise of this incidental power, Congress may legislate and has legislated by way of regulating the instruments and subjects of such commerce, and the persons engaged in it.

But the incidental power of Congress to legislate on such subjects, instruments and persons, does not make them or any of them interstate commerce, does not bring any of them within the definition above quoted or within the term "commerce among the several states" as used in the Anti-trust act.

(3). The acts which are charged to restrain and monopolize interstate commerce or to directly, im-

mediately and necessarily effect that result so that a combination to do them would be a combination in restraint of commerce, are (1) the formation of a corporation under the laws of New Jersey, for the purpose of investing in corporate shares and securities, a purpose sanctioned by its laws—though it would in no wise affect the character of the defendants' acts as violating or not violating the Anti-trust law, should it appear that those acts were prohibited alike by New Jersey, Wisconsin and Minnesota. (2) The acquisition by that company, whether by purchase for cash or in exchange for its own shares, or by both means, of a majority of the shares of each of the two railway companies.

(4). Now the ownership of these railway shares cannot posibly be a *direct* restraint on commerce, nor can the combination found by the Circuit Court—a combination for the purpose of having the Securities Co. obtain the shares by purchase and exchange—be a combination in *direct* restraint of commerce. How can the mere ownership of shares, *and nothing more done*, *directly* restrain the commerce of the companies or affect it at all? Something further must be done by somebody before commerce can be *directly* restrained, and it must be done by the only persons who can act *directly* on the commerce—by the boards of directors.

And even if the Securities Co. a mere stockholder, though a majority stockholder, could of itself *directly* restrain the commerce of the companies,

could do any act operating directly on the commerce, still it has done nothing of the kind. And the petition does not charge nor has the Court found that the conspirators ever meant or conspired to have the Securities Co. do anything more than buy the shares. It is not charged or found that they meant or conspired that the Securities Company should ever use its power as owner (if as owner it had any) to suppress competition or otherwise restrain commerce, directly or indirectly, whether by its own direct action, or by compelling the two boards of directors to engage in a criminal conspiracy.

It has been pointed out under our fourth point that between the Securities Co. and any act restraining or in anywise affecting the commerce of the two companies, must intervene the action of two independent boards of directors. We insisted there and insist now that this precludes any power of the Securities Co. to restrain the commerce of the companies either directly or indirectly. But surely it precludes any power of *direct* restraint. The acts restraining commerce which operate *on the commerce itself* to restrain it, and so *directly* restrain it, must be the acts of the two boards of directors, conspiring to commit a crime. We had thought (being instructed to that effect by this and other courts) that the board of directors of a corporation are quite different from agents and servants of the stockholders, seeing that agents and servants derive their office as well as every one of their powers from the principal or master, can act only in his

name, and can be discharged by him at pleasure. But even in case of agents or servants, we never heard that the principal or master was conclusively presumed to have the power to compel them to commit crimes. And the decision of the Circuit Court, that the directors of corporations are little if anything more than puppets in the hands of the stockholders—at least when the commission of crimes is involved—is without support in principle or authority.

Of course, we concede, once for all that a conspiracy may contemplate the doing of acts by agents and servants of the conspirators, and that in this case had the conspiracy included the doing, by an agent or servant, of an act operating *directly* on commerce and *directly* restraining it, it would (if a conspiracy at all) be a conspiracy in restraint of commerce.

And so a conspiracy may well be taken to include not only the acts which the parties agree to do, but the *necessary* consequences of those acts, or the consequences that ensue without the intervention of any other independent cause. Thus if the conspiracy were to obstruct commerce by starting a huge rock in a high bank alongside the track as a train was approaching, the headlong descent of the loosened rock would be as much within the conspiracy as the act of loosening it.

But nothing of the kind is found here. After the last act to be done by the conspiracy (if as the court finds, the Securities Co. was a member of it) should have been completed by the making of the

last stock purchase, no act could be done *directly* restraining the commerce of the companies except by persons not parties to the conspiracy nor subject to the control of the conspirators. Indeed, the Securities Co. itself was not subject to their control, the large majority of its stock (all above 140 millions) being held by the 1300 shareholders who were not conspirators, but who and their large holding, as well as the 600 existing Great Northern shareholders with their 30 millions of stock, are not taken into account by the Circuit Court. But it is these 1300 shareholders who have power to elect the board of directors of the Securities Co., and it is this board which has power to elect the boards of the two railway companies. And before it can be assumed that because of the conspiracy the Securities Co. will compel the railway boards to suppress competition, it might be well to inquire whether the 1300 shareholders who are not yet conspirators are going into any such conspiracy.

IV.

That the purchase and ownership of shares in railway companies are, even more than purchasers and sales of other property, matters not within the regulative power of Congress, is further shown by the following considerations:

Such property is of a somewhat peculiar nature. It is not an instrument of interstate commerce. It is neither visible nor tangible and cannot be transported from one State to another and

so be the subject of interstate commerce. A share of stock is the interest of the holder in the company, and—

> "The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining upon the termination or dissolution of the corporation after payment of its debts. *Gibbons v. Mahan*, 136 U. S. 549, 557.

And it is property created by the State creating the corporation. The property of the company may be any natural or manufactured product of earth, air or sea, but that of the shareholder is always the same intangible "right," the same chose in action.

As incident to his stockholding, the holder has the right to vote for directors. This right, too, is created by the State.

The corporation being the creature of the State, the shares being property created by the State, the voting right annexed to them being created by the State, it necessarily follows that the power to determine who shall be original holders of shares in any corporation, and who may thereafter purchase and hold them, and the extent of the holding permissible to any individual or combination or corporation, and what voting power shall attach to the shares, and whether the individual or corporate holder of stock in one company may acquire any, and,if any, how many shares in a competing company,—the power to determine every one of those things be-

longs to the State which created the corporation and can belong no where else.

2. All this is denied by the Government in this case. Its contention is—must be—that Congress may not only regulate the interstate commerce of State corporations, (a power undisputed,) but *may also regulate the holding of stock* in all state corporations doing an interstate business. It would make the act read (so far as this case is concerned) thus:

> "The holding by an individual, partnership or any combination of individuals, of the majority of the shares in each of any two railway companies incorporated by any state or states, and competing with each other to any extent whatever for interstate business, is hereby declared to be unlawful, anything in any state statute authorizing such holding notwithstanding."

And Congress might go farther and provide who may hold shares in any railway company, (for there is hardly a railway in the country, however insignificant, but carries on *some* interstate commerce) how many shares any one person or association may hold, what voting power the holders may have, what shall be necessary to a transfer of shares *inter vivos* or by will, and to whom they shall go in case of intestacy. And it could incidentally regulate the management if not the creation of all stock-exchanges in which shares are dealt in.

And if the power to regulate directly the commerce of a company includes the regulation of its

composition and internal constitution, Congress could certainly deal with stockholders and their shares in the manner just suggested.

But the *commerce* of a corporation is an utterly different thing from its *composition*, or its *property* or the property of its shareholders, and the power to regulate the one is entirely distinct from the power to regulate the others. And the whole case of the Government rests on a confusion of these two things—commerce on the one hand and composition and property on the other.

3. The claim of the Government in this case asserts for Congress the broadest power over the composition of state corporations, and asserts that Congress has exercised that power in the Anti-trust act by prohibiting an investment company, chartered by one state, from holding a majority of the shares of each of two railway companies engaged in interstate and local commerce, and created respectively by two other states.

Now, if this power exists in Congress, and has been exercised by the Anti-trust act, it is and has always been an exclusive power.

The Anti-trust act declares a uniform regulation throughout the United States. Any contract or combination that is within its scope is equally unlawful, equally criminal, whether made or formed in Minnesota or Massachusetts.

And it is perfectly well settled that where subjects for commercial regulation are of a nature to require or admit of one uniform system or plan of

regulation, the power to regulate them is exclusive in Congress, and any attempted regulation by a State, whether to enlarge or to restrain, is simply *ultra vires*, for it is the usurpation of a power vested exclusively in Congress.

Wabash etc. Ry. Co. v. Illinois, 118 U. S. 557, 574-5, *per* Miller, J.

Robbins v. Shelby Taxing District 120 U. S. 480, 492, *per* Bradley, J. and cases cited.

Phila. Steamship Co. v. Pennsylvania, 122 U. S. 326, 336, *per* Bradley, J.

Bowman v. Chicago, etc. Rd. Co., 125 U. S. 468, 480-1, *per* Matthews, J.

As the matters embraced in the Anti-trust act all admit of and require a uniform rule to which they are subjected by the act, they are all within the exclusive jurisdiction of Congress. Anything not within its exclusive jurisdiction is not within the act. If the act forbids such a holding of shares as that of the Securities Co., the three States which chartered these three companies could not authorize it.

The Government says in its petition that the Anti-trust act forbids such holding because effecting a "virtual" consolidation of the two railway companies and so a restraint of interstate commerce. If such is the effect of a mere "virtual" consolidation, an actual consolidation would be yet more obnoxious to the Anti-trust law, and must be as clearly within that law as is a "virtual" consolidation, and, like the "virtual" consolidation, a sub-

ject for Congress alone to regulate, and the Circuit Court so holds (II, 1708).

And if a State cannot authorize a consolidation of competing lines chartered by it and doing an interstate as well as local business, it cannot authorize the consolidation of connecting and non-competing lines. It is no answer to this to say that one would and the other would not *restrain* commerce. Both are or neither is a *regulation* of commerce. If it is a *direct* regulation (and unless it is, it is not with the power of Congress), then it is in the exclusive power of Congress, and the State is powerless to make it. If it is not a regulation of commerce at all (and this is its true character), or if it is an *indirect* regulation of interstate commerce, then it is within the power of the State and outside the power of Congress.

That such actual consolidations (and a *fortiori* mere "virtual" consolidation) are within the power of a state to authorize or forbid, has been expressly held by this Court. They do not, nor does the state law authorizing or forbidding them, *directly* affect interstate commerce. *And the existence of such right in the State to legislate on the subject is conclusive against the Government's claim that such consolidations are within the Anti trust law* because necessarily restrainining commerce, *for that law is confined to those subjects only which Congress has exclusive power to regulate*, and to those only which *directly* affect interstate commerce.

A "virtual" consolidation is no more within the law than an actual one.

And it is enough that the State *has power* to authorize or forbid consolidations of its corporations. Its jurisdiction and the want of any in Congress do not depend on its exercise of the jurisdiction in one way or another. So far as regards congressional power over any consolidation, the case is the same whether the state has authorized, forbidden or merely tolerated it.

4. A complete bar to the Government's attempted encroachment on the rights of the States and their citizens is found in *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, and *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677.

In the former case a Great Northern shareholder brought suit to enjoin the carrying out of a contract between that company and the bondholders of the old Northern Pacific Railroad Co., by the terms of which, on the organization of the present Northern Pacific Co. (then about to tke place), one-half the capital stock of the Northern Pacific Co. was to go to the shareholders of the Great Northern Co. or to a trustee for their use.

The agreement was attacked as effecting a "virtual consolidation," because though in form the Northern Pacific shares were to go to the Great Northern shareholders, they were really to go to the Great Northern Co., which was to furnish all the consideration for them; and because it was in viola-

tion of the statutes of Minnesota of 1874 and 1881, forbidding two competing railway companies to consolidate and forbidding each of them to hold ny stock in the other.

On the other hand the company claimed that the unrestricted right to consolidate with any company which was given by its charter was not and could not be limited by the subsequent acts of 1874 and 1881.

The case showed that the lines of each company extended from St. Paul to Puget Sound, but it does not seem to have occurred to counsel on either side that the charter grant of a right to consolidate with a railway engaged in interstate commerce was beyond the power of the legislature, and that the general restriction of stock ownership and consolidations was also unconstitutional as applied to such railways. But the court must have had these points in mind, for they were made and ruled in the *Louisville & Nashville Case*, decided at the same time. The decision sustained the Minnesota legislation, on the ground that the stock was really to go to the Great Northern Co., and not to its shareholders, and, after stating this ground of decision, Mr. Justice Brown thus expressed the further decision of the Court as to the right of the shareholders to do what the company was prevented from doing by the Minnesota statute.

> "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain

separate corporations with no interests, as such, in common."

The Court that made this decision could hardly have supposed that such a holding of stock would be a restraint of interstate commerce. They may not have had in mind the Anti-trust law, but a combination or conspiracy that is declared to be unlawful by that act was just as unlawful before and without it.

In *Louisville & Nashville Rd. v. Kentucky*, 161 U. S. 677 (decided at the same time with the *Pearsall Case*), the State sought to enjoin the railway company from purchasing the property of a competing railway company at a judicial sale, contrary to the constitution of the State. Both railways were engaged in interstate commerce. In the first of the following paragraphs the right of the State to determine who shall and who shall not own stock in her corporations, is fully recognized. The rest of the quotation is a complete answer to the claim that Congress has any jurisdiction to regulate the stock-holding of a State corporation, or to authorize or prohibit the consolidation, actual or "virtual" of State railway companies, whether competitive or not, and whether engaged in interstate commerce or not.

The Court says (per *Brown*, J.):

(P. 693):

"It is true, as was observed in *Pearsall v. The Great Northern*, that the stockholders of the L. & N. Co. may individually become the

purchasers of the Chesapeake Co. at a judicial sale, and may organize a new corporation but it would be still a corporation separate and distinct from that of the L. & N. Co. The inhibition of the Constitution *is not against the sale to individuals, though they may chance to be stockholders in a competing line*, but against the acquisition by a railway, in any form, of a parallel or competing line. If this could be evaded by going through the form of a judicial sale, the constitutional provision would be of no value. * * *

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. * * * In the division of authority with respect to interstate railways *Congress reserves to itself the superior right to control their commerce* and forbid interference therewith; while *to the states remains the power to create and regulate the instruments of such commerce*, so far as necessary to the conservation of the public interests.

"If it be assumed that the states have no right to forbid the consolidation of competing lines, because *the whole subject*" (i. e. the whole subject of consolidations, whether to authorize or forbid), "is within the control of Congress, *it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness.*" * * *

"While the constitutional power of the state in this particular has never been formally passed upon by this court, the power of state legislatures to impose this restriction upon the general authority to consolidate has been recognized in a number of cases."

This case is cited with approval in *Louisville & Nashville Rd. v. Kentucky*, 183 U. S. 503, 518.

This decision cannot be limited so as to uphold only such legislation concerning the consolidation of competing railroad companies or the purchase of stock in one by the other, as is prohibitory. The State may forbid such consolidations, etc., because it has *the general power over all consolidations and stock purchases of railway companies of its own creation*, to authorize or prohibit. And *because it has this general power*, it may, while authorizing one consolidation or one class of consolidations, forbid another or another class.

And such was the opinion of this Court in the case cited. The issue was, in its own language, whether "the *whole subject* is within the control of Congress"—that is, the whole subject of consolidations, what to authorize as well as what to forbid. And in the last sentence quoted the Court recognizes the power of the State to grant "general authority to consolidate," with or without restrictions, and, *because of such general authority* "to impose this restriction upon the general authority."

The Circuit Court takes no notice of this decision, but leaves no doubt tht it was fully aware that its own decision was a denial of the right of a state to authorize the consolidation of two of its own railway companies. After holding that the essence of the restraint of commerce was the suppression or restraint of competition, and that whatever combination (in corporate form or otherwise) effects

this result is prohibited by the Anti-trust Act, it says (p. 1708):

> "Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement, *if the two railroad companies were consolidated under a single charter.*"

The Court was perfectly aware of the far-reaching effect of its decision—that it denied to the states powers that had been exercised without question for two generations, and by the exercise of which the railway system of the country had reached its present form, and awarded to Congress powers over the acquisition and ownership of property within the states, and over the constitution and composition of corporations created by the states, which no one ever imagined it to possess before the bringing of this suit. And it is due to that court to acknowledge that in this momentous decision there is no paltering, no attempt to minimize its far-reaching effect; the Court certainly had the courage of its convictions.

5. The application of the rule so clearly stated in the case cited is this:

The interstate commerce of any corporation is exclusively subject to congressional regulation.

The composition and internal constitution of any corporation (whether engaged in interstate commerce or not) including all matters of its government and control, and all relating to the creation, acquisition, holding and transfer of its shares are

subject to the exclusive regulation of the State, none of them being matters of interstate commerce.

If persons who have acquired a majority of the stock of each of two interstate railways conspire with the directors of either or both of the railway companies to restrain their interstate commerce, this will be a violation of the Anti-trust law and may be restrained by a proceeding like this.

But the mere acquisition and holding of a majority of the stock of two competing interstate railway companies by the same person or persons, individual or corporate, or any combination for that purpose, does not of itself restrain interstate commerce, or constitute a combination to restrain it, and does not render such persons subject to congressional regulation, or to proceedings under the Anti-trust act.

SEVENTH.

The very general language of the Anti-trust Act was not intended to include combinations to purchase railways or railway shares, competing or non competing, nor consolidations actual or "virtual" of railways or railway companies. Congress, when passing the Act, knew that the railway system of the country rested on such combinations authorized by State laws, some of them having existed many years. If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void, and the State legislation unconstitutional, it would have said so in plain, specific and apt language.

The construction put on the Act by all branches of the Government and by everybody down to the commencement of this proceeding, has been in full accord with our position that the act has nothing to do with combinations to own railways or railway shares.

I.

1. From the infancy of railroads in this country,—before and since the passage of the Anti-trust act—the States have assumed and exercised the power of authorizing one railway company to pur-

chase or lease a competing line, or to acquire a majority or all of the shares of a competing company, or to acquire all or the majority of the stock of two companies competing with each other though not with the purchaser, or to lease the competing lines of such companies, or to effect an out-and-out consolidation with the competing company.

And in the exercise of this power they have made no distinction between lines doing an interstate business and those (few, if any) purely local.

During all this period while questions had, from time to time arisen as to whether a particular consolidation, lease or purchase of railway or stock was authorized by the laws of a state, there never was any question as to the power of the State to authorize them. Nowhere in the law reports, the text-books, the writing upon railways and commerce, or the proceedings of the legislative bodies, State or Federal, is there to be found a suggestion or intimation that such leases, purchases, or consolidations were restraints (much less *direct* restraints) upon interstate commerce, or that the legislation authorizing them was *ultra vires* of the States and an encroachment on the exclusive power of Congress to regulate such commerce.

Now when Congress passed the Anti-trust act, it must be presumed that in so far as it intended to legislate in regard to railways and railway companies, it did so with full knowledge of the subject-matter of its legislation. Chesapeake & Ohio Tel. Co. v. Manning, 186 U. S. 238, 245. The railway

interest was then as it has ever since been the most important of all those conducted by combined capital. Moreover the business of the companies is to perform for the sovereign a duty of the sovereign—to furnish highways for transportation—and to that end they are delegates of a prerogative of the sovereign. Congress knew, as the court must judicially know, the location and nature of that great highway the New York Central Railroad, and of other railways connecting the principal cities of the country, as well as it knew as those of the Mississippi River or any other natural highway.

Moreover, Congress had for some years been engaged in regulating the interstate commerce of all these roads, and its commission had reported to it some, at least, of these various instances of purchases, leases and consolidations of, and stock ownership in, competing companies.

3. While there can be no doubt that this court takes judicial notice of the formation of the great railway systems of the country by the processes mentioned and under State authority, and takes judical notice that such exercise of State authority was never questioned, and that all this was known to Congress when passing the Anti-trust law, we have produced for the information of the Court a mass of information on this subject extracted from the standard work on the subject of railways, a work at once contemporaneous and historical, (published as it is from year to year,) and of wide cir-

culation and in general use by all persons interested in the history or present condition of the railway companies of the country and their lines, as the one recognized authority on the subject.

The proof of the character and wide circulation and accuracy and recognized authority of this series of books known as "Poor's Manual," is found in the testimony of Capt. Meany, (I, 876, 886-892) and is plenary.

In addition to Poor's Manual, we have also produced the reports of the Interstate Commerce Commission, made directly to Congress, in the year 1889 and subsequent years.

The extracts from Poor's Manual are Defendants' Exhibits 18 A to 18 E, inclusive, (II, 1013-1120).

Those from the Interstate Commerce Commission reports are Defendants' Exhibits 20 A—20 L, inclusive, (II, 1125-1615,) with an explanatory note by the Commission, Exhibit 20, (II, 1121).

These exhibits, when offered, were objected to, and an argument was had on the objections, to which we refer, without repeating it. (I, 876-886).

That all the matters for which these Exhibits are produced, are within the judicial knowledge of the Court, is we think beyond question. This was in effect admitted by the Solicitor General in the argument above refered to (I, 884, fol. 3509). And see

Ohio Life & Trust Co. v. Debolt, 16 How. 416, 435, where the Court (by Taney, C. J.) says: "It is a matter of public history, which this court cannot refuse to notice, that almost every bill for the in-

corporation of banking companies, insurance and trust companies, railroad companies or other corporations, is drawn originally by the parties who are personally interested in obtaining the charter."

Railroad Co. v. Maryland, 21, Wall. 456, 469, where the court (per Bradley, J.) says of the Washington branch of the Baltimore & Ohio railroad: "That the road is one of the principal thoroughfares in the country for interstate travel is conceded, and indeed may be judicially assumed."

Brown v. Piper, 91 U. S. 37, 42, where the court (by Swayne, J.) quotes with approval the above passage from 16 How. 435, enumerates various classes of facts that need not be proved, among them those "of universal notoriety," and says: "Courts will take notice of whatever is generally known within their jurisdiction; and if the judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper."

Phillips v. Detroit, 111 U. S. 604, 606.

Lehigh Valley Rd. v. Pennsylvania, 145 U. S. 192, 201, where the question was on the validity of a state tax on receipts for transportation by rail between points in the State of Pennsylvania, a part of the railway over which the transportation was had being outside of the state. The court takes judicial notice that the Nashville, Chattanooga & St. Louis Ry. Co. is a Tennessee corporation, but through freight and passengers carried by it from

Nashville to Chattanooga pass over a few miles in Alabama and perhaps two in Georgia; and that the Erie Ry. Co. does not escape taxation in respect of its business between New York and Buffalo because some miles of its road are in Pennsylvania, while the New York Central is taxed on its business between the same places because its rails are wholly within the State of New York.

In *Louisville & Nashville Rd. v. Kentucky*, 161 U. S. 677, 699, where the question was upon the validity, under a Kentucky statute, of the purchase of the railroad of one company by a competitor, the court takes notice of the "familiar instance of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester, and, of its own judicial knowledge, says: "These are strictly parallel lines, but only in a limited sense competing."

See also

Preston v. Browder, 1 Wheat. 115, 121.
U. S. v. Union Pacific Rd. Co., 91 U. S. 72, 79.
Platt v. Union Pacific Rd. Co., 99 U. S. 48, 55.
Chesapeake & Ohio Tel. Co. v. Manning, 186 U. S. 238, 245.

And these documents are offered not in proof of issuable facts, but to aid the Court in the construction of a statute. While it is not necessary to offer proof of matters of which the court takes judicial

notice, there is no rule excluding it. And there is certainly no impropriety in furnishing the court, in a condensed statement admitted to be correct (I, 894, 917), what the court would have a right to seek in the many volumes from which the statement is made.

The Interstate Commerce reports, made to Congress, are of course primary evidence of the facts stated in them and that such facts were known to Congress. Poor's Manuals are also, as standard records and histories of the time, competent evidence of the matters stated in them, and certainly are the best evidence of their own contents and of the publication and repetition, year after year, of the statements we have extracted from them.

The Interstate Commerce Commission refused to furnish the documentary evidence in its possession which would have been primary evidence (I, 873-5, 984). And this refusal raises the presumption that such evidence, if produced, would have told in favor of the defendants, and removes any objection that might be made to Poor's Manual as not primary evidence.

4. The matters in Poor's Manual and the Interstate Commerce Commision Reports, are summarized in the following statement, which includes purchases, leases, etc., made since as well as those made before the passage of the Anti-trust act.

Boston & Maine Railroad Company.

The Eastern R. Co. of Mass., the Eastern R. Co. of N. H., and the Portland, Saco & Portsmouth R. Co. were respectively chartered by the States of Massachusetts, New Hampshire and Maine to build railroads in those states, connecting with each other and forming a continuous line of interstate railway from Boston to Portland. The whole line was completed in 1842, and the Eastern R. Co. of Mass. thereupon became the lessee of the roads of the other two companies. (II, 1014-5).

The Boston & Maine R. Co. was formed in 1842 by consolidation of three companies chartered by the same states to build from Boston to Portland. At an early date it built as far as South Berwick, Me., reaching Portland over the tracks of another company. In 1873, it completed its own line from Boston to Portland, adjacent to and parallel and competitive with that of the Eastern R. Co. (II, 1013).

On December 22, 1883, the Eastern R. Co. of Mass. leased to the Boston & Maine R. Co. all its property and franchises of every description, assigning its lease of its connecting roads (II, 1013).

Ever since that time the Boston & Maine Co. has operated as well for local as for interstate business, these two parallel and competing lines between Boston and Portland.

On May 9, 1890, the Boston & Maine and the Eastern of Mass. were consolidated, the stock of

the Eastern being replaced by stock of the Boston & Maine (II, 1020-1), and on June 1, 1899, the Boston & Maine acquired in like manner all the shares of the Eastern of N. H., and, on January 1, 1900, all the shares of the Portland, Saco and Portsmouth, in exchange for its own shares created and issued for that purpose (II, 1024-5).

In 1887, the Boston & Maine Co. leased for 99 years the property and franchises of the Boston & Lowell R. Co., including its leased lines, among them the line of the Boston, Concord and Montreal Co. (since reorganized as the Concord & Montreal Co.), thus acquiring a line from Boston via Lowell and Concord to Groveton in New Hampshire, and connecting near that point with the line of the Maine Central R. Co. leading into Canada and connecting with lines to Quebec and Montreal (II, 1017-8). A majority of the stock of the Maine Central Co. was acquired by the Boston & Maine as early as 1890 (II, 1021) and has ever since been held by it.

In the same year, 1887, under its lease of the Boston & Lowell, the Boston & Maine Co. also acquired a lease for 99 years of the Connecticut & Passumpsic Rivers R. R. extending from White River via Wells River and St. Johnsbury to Newport, Vt., and also the Newport and Richmond R. R. extending from Newport to the Canada line and there connecting with railways reaching Montreal and also Quebec (II, 1018); and also a lease for 99 years of the Northern R. R. of N. H., extending

from Concord on the line of the Boston, Concord & Montreal R. R. to a junction with the Conn. & Passumpsic Rivers R. R. at White River Junction (II, 1018), those three roads, thus forming a parallel and competing line with that by way of the Maine Central to Montreal and Quebec.

So that, at the date of the Anti-trust act, the Boston & Maine, by lease or stock ownership of competing lines, controlled all the rail lines from Boston ta Portland and all between Boston and Montreal and Quebec. The only other route was by steamer from Boston to Portland, and thence by the Grand Trunk Railway of Canada to Montreal and Quebec.

In 1889 the Boston, Concord & Montreal Co. was consolidated with the Concord R. Co., under the name of the Concord R. Co., and on June, 29, 1895, a new lease of its road from Nashua to Groveton Junction, for 91 years, was made to the Boston & Maine Co. (II, 1024).

New York, New Haven & Hartford R. Co.

The New York & New Haven R. Co. was chartered prior to 1850 to build and operate a railroad from New York to New Haven, Conn. It built from Williamsbridge on the New York and Harlem road, 14 miles from New York, to New Haven, 62 miles, securing a perpetual right over the Harlem road to New York. Its road was opened in 1849 (II, 1026-7).

In 1870 it leased for 99 years the Shore Line

Railway, extending from New Haven to New London (II, 1027-8).

In 1872 it consolidated with the New Haven & Hartford R. Co. owning a line from New Haven to Springfield, Mass., which had been opened in 1839, the new company being named the New York, New Haven & Hartford R. Co. (II, 1027).

In 1885 the Company had acquired the majority of the stock of the New Haven & Northampton R. Co. whose line, extending from New Haven to Northampton, Mass., had been operated since 1857, and was directly parallel to and in close proximity with the line from New Haven to Springfield (II, 1027, 1031). In 1887, it took a perpetual lease of that line (II, 1031).

In 1892 the company took a lease of the New York, Providence & Boston R. Co., whose line extended from New London, where it connected with the Shore Line, to Providence, where it connected with the Boston & Providence R. R. The lease was coupled with an agreement for an exchange of stock, which was carried out the same year, and it thus acquired all the shares of that company (II, 1031, 1034).

The New York, Providence & Boston R. Co. owned the majority of shares of the Providence & Stonington Steamboat line, operating steamboats between New York and Stonington, there connecting with the New York, Providence & Boston, and, with it and the Boston & Providence R. R., forming

a through line between New York and Boston (II, 1033-4).

In 1893, the company leased the lines of the Old Colony R. Co., acquiring thereby that company's lease of the Boston & Providence Railroad, extending from Boston to Providence (II, 1036-7, 1038).

The company had thus acquired an all-rail line from New York to Boston.

The Old Colony Co. owned a majority of the shares of the Old Colony Steamboat Company (II, 1038), which, in connection with its rail line from Boston to Fall River, made the well-known Fall River Line between Boston & New York.

The company thus held an all-rail line from New York to Boston, and two of the three rail-and-water lines, viz, the Stonington and the Fall River Line.

Of the other lines between those cities, the all-rail line via Springfield was made up for more than half its length by the company's line from New York to Springfield, the rest being the Boston & Albany Railroad.

The only remaining lines between the two cities were those of the New England R. Co. consisting of an all-rail line and also a rail and water line (the Norwich Line, so-called) made up of the Norwich and New York Transportation Co., the Norwich and Worcester R. Co. (which owned all the stock of the steamboat company and was itself leased by the New England Co.), and the main line of the New England (II, 1041, 1043).

In 1898, the New England road (with its lease of the Norwich & Worcester and that company's stock ownership of the Norwich and New York Transportation Co.) was leased for 99 years to the New York, New Haven & Hartford Co., with an arangement for an exchange of stock, under date of July 1, 1898. By the end of that year the company had acquired, by such exchange, substantially all the stock of the New England Co. (II, 1043-4).

Thus the company, besides its rail line from New York to Boston via New London and Providence, and the greater part of the Springfield line, acquired also the only other rail line, and each of the three subsisting rail and water lines.

These acquisitions were made partly by lease and in part by stock ownership, and, in most cases, the leases were followed by large stock acquisitions, even to the surrender and merger of all the stock of the lessor.

The result of this is that one cannot go from New York to Boston by rail or water without going over one of several parallel and naturally and originally competing lines, but which are now operated by the New York, New Haven & Hartford R. Co. having been acquired in the manner above stated.

New York Central & Hudson River Railroad Co.

This company was formed by a consolidation of the New York, Central Railroad Company and the Hudson River Railroad Company, the former being

itself a consoldidation fo a number of small companies (II. 1058, 1060).

Its line extends from New York City along the Hudson River to Albany, thence westward to Buffalo, connecting there and forming through lines with the principal roads to the west and southwest.

On November 24, 1885, it leased for 475 years from January 1, 1886, the West Shore Railroad, which had been opened for travel in 1884, and which extends from Weehawken, N. J., up the Hudson River to the Mohawk River, and thence alongside the New York Central to Buffalo to a like connection with railroads to the west and southwest, and with ferry connection between Weehawken and New York, by reason of its stock ownership and lease of the West Shore and Ontario Terminal Company (II, 1061-2).

Each railroad passes through Utica, Syracuse, Rochester and the other principal cities of central and western New York, and they are strictly parallel and competing lines for interstate business. At the time of taking the lease, the New York Central also acquired all the stock (being 10 million dollars) of the West Shore Co., and has ever since used that road for interstate business between New York and Weehawken and all points on its line and west or southwest or northwest of Buffalo (II, 1061-2, 1063, 1064, 1066).

On March 14, 1891, the New York Central Co. leased in perpetuity the lines of the Rome, Watertown & Ogdensburg Railroad, which are parallel

and competing lines with its own for local and interstate commerce (II, 1066-7).

The Lake Shore & Michigan Southern Railroad Co. has for many years owned and operated a railway extending from Buffalo, N. Y. (where it connects with the lines of railroad leading from that city to New York, Boston and other eastern points), to Chicago (II, 1069).

In 1882, the New York, Chicago & St. Louis Railway Company (familiarly known as the "Nickel Plate") completed and put in operation a railway from Buffalo to Chicago, with like connections at each city as the Lake Shore & Michigan Southern Co., and it was a strictly parallel and competitive railway with the road of that company (II, 1074-5). Later in the same year a majority of the stock of the Nickel Plate Co. was acquired by the Lake Shore (II, 1070, 1075). In 1887 the road was sold under foreclosure and was reorganized with a reduced capital of 30 millions, a majority of which has ever since been held by the Lake Shore Co. (II, 1073, 1074, 1075).

The Michigan Central Railroad Company completed its line from Detroit to Chicago in 1852, using the Illinois Central road for the last 14 miles into Chicago. In 1883, it assumed the operation of the Canada Southern Railway under a sort of partnership agrement (II, 1077), thus giving a through line from Buffalo to Chicago with eastern and western connections at both cities. These three roads, the Michigan Central and Lake Shore and

the Nickel Plate constituted and were operated as competing roads for interstate business between Buffalo and Chicago and points east and west of those cities. In 1898, the New York Central & Hudson River Co. acquired about 45 millions of the 50 millions of capital stock of the Lake Shore (II, 1064, 1072) and about 15 millions of the 19 millions capital stock of the Michigan Central Co. (II, 1064, 1078). And these holdings have since been largely increased (II, 1064-5).

The result of these various acquisitions is that the New York Central Co. controls by stock ownership (and in case of the West Shore by lease also) two parallel and competing lines of railway between New York and Buffalo connecting there with three parallel and competing lines from Buffalo to Chicago of which it owns nearly all the stock—lines having perhaps the largest traffic of any in the United States.

Not long after its acquisition of the stocks of the Lake Shore and the Michigan Central, the New York Central Co. also acquired a majority of the capital stock of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (known as the Big Four) and also of the Lake Erie & Western R. Co. The lines of these companies are shown in II, 1078, 1080, and it will be seen that they are parallel and competitive with each other and with the other lines controlled by the New York Central, as before stated.

Pennsylvania Railroad Company.

At an early date in the railroad history of the country, the State of New Jersey chartered the Camden & Amboy Railroad Company and the Delaware & Raritan Canal Company, the former of which built a road from Camden, N. J., opposite Philadelphia, with which it connected by ferry, to Perth Amboy, N. J., subsequently continued to Jersey City. This road was completed in 1838. In 1836, these companies, which had been in a measure united and were known as the United Companies, acquired a controlling interest in the Philadelphia & Trenton R. Co., the line of which last company, with that of the New Jersey Railroad & Transportation Company and those of the United Companies, formed another through line between Philadelphia and New York. In 1867 the United Companies and the Transportation Co. consolidated their interests by authority of a statute of the state printed *infra*, in the appendix.

In 1871, the Penn. R. Co. took a perpetual lease of these two parallel and competing lines of railway between New York and Philadelphia and has ever since operated them (II, 1083-4) 1087, 1089, 1090, 1092-3).

Since 1885, the Penn. R. Co. has owned substantially all the stock of the Philadelphia, Wilmington & Baltimore Railrorad Company, whose lines extend fom Philadelphia to Baltimore, and the Baltimore & Potomac R. Co., whose line extends from Balti-

more to Washington (II, 1091-2). These two lines constitute, with the New Jersey leased lines before mentioned, a through line, and operated as such between New York and Washington.

The Penn. R. Co. also owns and operates a line from Harrisburg along the Susquehanna River to Williamsport, where it connects with the Philadelphia and Erie R. Co., connecting at Erie with the lines of shipping on the lakes and the lines of railroad running westward through Ohio and other states. It also controls the Erie & Pittsburgh Railroad Company with a line between these cities, which with the company's main line between Harrisburg and Pittsburg, constitutes a second parallel and competing line between Harrisburg and Erie, having at Erie the same lake and rail conections as the Phila. & Erie.

Prior to 1871, the Pennsylvania Railroad Company leased the roads of various companies and owned a majority of the stock in other railroad companies, all west of Pittsburg. In that year it organized a "holding and operating company," by the name of the Pennsylvania Company, under a charter obtained the year before, and transferred to the new company its interest in these leased lines and the shares owned by it in other companies. Among the lines leased by the Penn. R. Co. and the leases of which were transferred to the Pennsylvania Company, was the Pittsburg, Fort Wayne & Chicago Railway, extending from Pittsburg, via Alliance, Mansfield and Fort Wayne, to Chicago,

commonly known as the Fort Wayne Line. This road had been built and put in operation prior to 1869, and in that year was leased to the Penn. R. Co. for 99 years, with a provision for issuing to the lessee special stock to the amount of the cost of all betterments made by it. As a result of this provision the lessee has become the owner of 22 million dollars of such stock being a majority of the stock of the company (II, 1085-6, 1098, 1100).

At the time of the organization of the Pennsylvania Company, the Penn. R. Co. held a majority of the stock of the Pittsburg, Cincinnati & St. Louis Ry. Co., extending from Pittsburg to Columbus, Ohio, and also to Cincinnati and other points, and of the Chicago, St. Louis & Pittsburg R. Co., whose line extended from Columbus to Indianapolis, and also, via Bradford Junction, to Chicago (II, 1100, 1103).

The Pittsburgh-Chicago line thus constituted is a parallel and directly competing line with the Fort Wayne between Pittsburg and Chicago, and is known as the "Pan Handle Line." The two companies which united in its ownership, were consolidated in 1890 as the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co., the Pennsylvania Co. keeping the same "control through ownership of stock." (II, 1102, 1104).

The capital stock of the Pennsylvania Company was all issued to the Penn. R. Co. in consideration of the transfer to it of the leases and stockholdings of the latter company in roads of companies west of Pittsburg, and for no other consideration, and the

whole of it has at all times been held by the Penn. R. Co. (II, 1087, 1901, 1097-8).

The Baltimore & Ohio R. Co. for many years owned and operated a very extensive system of railways competitive with that of the Penn. R. Co. It owned a line from Washington via Baltimore to Philadelphia (II, 1105-6), and in connection with the Philadelphia & Reading, operated the well known Blue Line between New York & Washington in direct competition with the Penn. R. Co. By means of this and its other lines, it operated a direct route between Philadelphia, New York, Washington and Chicago, and reached Pittsburg and most of the lake and river cities reached by the Pennsylvania Company. The Chesapeake & Ohio Ry. Co. owned and operated a line from Washington and from the seaboard at the mouth of the Chesapeake Bay, traversing the states of Virginia, West Virginia and Kentucky, reaching Louisville and Cincinnati, and forming a competing line with the Pennsylvania Company between these places, and also, by water transportation, a competing line to New York, especially for the carriage of bituminous coal. The lines of the Norfolk & Western Ry. traverse much of the same territory and were competing lines with the Chesapeake & Ohio. About the year 1899 or 1900, the Penn. R. Co. and the Pennsylvania Company acquired a very large holding of the shares of each of these companies (II, 1108-1112), which has since been increased to a majority.

The Reading Company.

The Reading Company is a holding Company. It was incorporated as the Excelsior Enterprise Company in 1871. Its name was changed to the National Company in 1873, and to the Reading Company in 1896. In the latter year it acquired all of the capital stock of the Philadelphia & Reading Railroad Co. and of the Philadelphia & Reading Coal & Iron Co., and has ever since held them. The Reading Railroad Co., as is well known, is one of the principal coal carrying roads. A close competitor of it, and paralleling its lines at nearly all points, has been the Central Railroad of New Jersey, also a coal mining and coal carrying road. In 1901, the Reading Co. owned all the stock of the Philadelphia and Reading Railroad, and had acquired more than 53 per cent of the capital stock of the Central Railroad of New Jersey "and together with that company owns or controls about 63 per cent of all the unmined anthracite coal in the State of Pennsylvania." It would seem that, the Reading Company being a holding company pure and simple, we have here a case "on all fours" with that of the Securities Co., which, during the taking of testimony in this case, counsel for the Government were so anxious to have produced that they might prosecute it. (II, 1113, 1120).

5. The above statement includes one or more specimens of each of the various forms of transactions by which the operation of each of two competing interstate railways was placed under the same management, or where the stock ownership of two or more competing companies was placed in the same hands before and at the date of passage of the Anti-trust Act.

The Boston and Maine first leased the Eastern, and the lease was reported to Congress in the first report of the Interstate Commerce Commission, in 1889 (II, 1128). Before the following year the two companies had been consolidated by the greater absorbing the less, which went out of existence, so that in 1890 and following years the Eastern of Mass. makes no appearance in the Commission's reports (II, 1154).

The lease of the West Shore by the N. Y. Central was coupled with a transfer of the entire capital stock (10,000,000) of the former to the latter.

The Penn. R. R. Co.'s lease of the New Jersey railways was a lease of lines not competing with its own, but naturally competitive with each other, and which had for many years been in a measure consolidated under express legislative authority.

The Lake Shore Co.'s relation to its competitor, the Nickel Plate, was that of purchaser and owner of a majority of its stock.

Of the two competing lines from Pittsburg to Chicago—the Fort Wayne and the Panhandle—the Penn. R. Co. originally operated the first as lessee and held all or a majority of the stock of the other.

It transferred its holdings of stock and its lease, with other like property, to its creature the Pennsylvania Co., which it caused to be chartered for that purpose, and which paid for such transfers only by exchanging its own shares therefor (much like what is charged as showing bad faith when done by the Securities Co.), and all which shares—the entire capital stock of the Pennsylvania Co.—were thus obtained and have always been held by the Penn. R. Co.

As stated, all these transactions had necessarily been done under legislative authority. A railway company would have no power to do any of them without such authority. A few of the laws—or the material part of them—are printed as an appendix to this brief, to show that the States claimed and exercised the power to authorize such purchases, leases, consolidations, etc. And that such power and the lawfulness of the purchases, etc., authorized by it had never been questioned, was conceded by everybody, at the time the bill for the Anti-trust Act was presented to Congress.

6. We have attempted to show that even such intimate alliances as those of which then existed and were known to Congress, being matters of the composition of the companies or the ownership of the roads, whether in fee or for a long term of years, are not matters of interstate commerce, and do not regulate it—certainly do not *directly* regulate it, and that such was the prevailing—the uni-

versal—opinion in 1890. Is there any reason to suppose that Congress was of a different opinion, or, if it differed with the States on the question of power, that it had any objection to such purchases, leases, consolidations, etc., in themselves?

There is certainly no ground for either supposition. And if Congress shared the prevalent opinion, under which the States had legislated and railway systems had been built up, that these matters were matters to be regulated by the States and not by Congress, that such regulations did not *directly* regulate *commerce*, and such consolidations, leases and purchases, etc., did not *directly* affect (much less restrain) interstate commerce, then Congress considered that these matters were not within its jurisdiction, and certainly did not mean to include them in an act which embraces only *direct* restraints, and combinations in *direct* restraint, of commerce.

And Congress know that in aid of these railway and stock purchases and consolidations, stocks and other securities to the amount of tens—indeed, hundreds—of millions of dollars had been authorized by the States and had been issued, every one of which, if such purchases and consolidations were unlawful, was issued in aid of illegal transactions, for illegal considerations and purposes, and was utterly void.

And even if Congress failed to share the general opinion as to the seat of power to authorize such consolidations, stock purchases, leases, etc., of interstate railways, could it have meant by the gen-

eral terms of the act to strike a ruinous blow at the railway systems of the country, and at the holders of their securities?

Had the bill for the act specified these various classes of consolidations, etc., declared them to be combinations in restraint of commerce and illegal, declared all the State laws authorizing them to be usurpations of the power of Congress, and contained also the existing 4th section requiring the Attorney General to proceed against them, can it be believed that Congress would have passed it? And had such a bill been passed, can there be any doubt of the panic that would have followed? Is it conceivable that Congress should have passed such an act to overturn past transactions? Would it not have limited its provisions to future cases?

But the language of the act has no such limit, and this is one of the many cogent reasons for confining it to executory and continuous agreements for carrying on trade or commerce. It includes *all* existing combinations in restraint of commerce. It does not purport to *make* them illegal, but declares them to be so. And there can be no question but that every combination declared illegal by the act, would have been equally so—no more, no less—before the act. And if not illegal before the act, it is not made illegal by the act. Combinations *not directly* restraining interstate commerce were not illegal before the act, and are not made so by the act. Combinations *directly* restraining that commerce are declared illegal by the act, but they were equally illegal before the act; and every one of the

various consolidations is just as subject to a prosecution like the present as if it had been formed at any time since the passage of the Anti-trust law —as if it had been formed during the past six months.

That combinations in *direct* restraint of interstate commerce were illegal before the passage of the Anti-trust law, and whether authorized or not by State statutes, is pointed out by Justice Brewer in the *Debs Case*, 158 U. S. 564, 581, in a passage repeated with approval in *Addyston Pipe Co. v. United States*, 175 U. S. 211, 229.

II.

1. The foregoing argument drawn from the history and situation of the principal railway systems of the country before and at the time of the passage of the Anti-trust Act and known to Congress when passing it, is reinforced by the contemporaneous construction that has been placed upon the act by all branches of the Federal Government—including the department specially charged with its enforcement—by the State Governments, by the railway companies, and by the public at large.

The abstract of extracts from Poor's Manual shows that since the passage of the Act, the building up of great railway systems by the processes already described has been continued on a vaster scale.

The Boston & Maine Co. has enlarged its holdings in other companies and systems, until it controls by ownership of the stock of such companies, com-

peting with it or with each other, not only the only two rail lines between Boston and Portland, but every line between either of those cities and Montreal or Quebec, save only the Grand Trunk Railway of Canada, running from Portland to the two last named cities.

The New York & New Haven operates by ownership and lease the Shore Line from New York to Boston; by lease and ownership of all the stock of the company, the competing New England road; by ownership, about two-thirds of the Springfield line. By its lease and ownership of the New England road, and ownership of the stock of the Norwich Steamboat Co., it operates the Norwich rail-and-water line between New York and Boston. Its absorption of the New York, Providence and Boston Co., and consequent ownership of all the stock of the Stonington line of steamers, enables it to and it does operate the Stonington rail-and-water line between New York and Boston. And it operates the celebrated Fall River rail-and-water line between the same cities by lease of the Old Colony railroad (in which company it has also a large stock interest) and by virtue of its ownership of a majority of the stock of the steamboat company.

Every one of these six lines is a naturally competing line with each of the others. If there is any other way of going between New York and Boston by rail or rail and water (except by way of Albany) it is not known to the writer.

The New York Central, while still holding its lease of the West Shore, and all the stock of that

company, has leased perpetually the Rome, Watertown & Ogdensburg road (a corporation doing a competing interstate business), and has acquired directly nearly all the stock of two (and indirectly a majority of the stock of a third) interstate competing lines, each extending and doing an immense business between Buffalo and Chicago, viz: the Michigan Central, the Lake Shore and the Nickel Plate.

It has also acquired a majority of the shares of two other interstate roads competing with the two last mentioned and with each other, viz: the "Big Four" and the Lake Erie and Western.

The Pennsylvania R. Co. has not been behind its great rival. It has acquired the stock control of the Baltimore and Ohio, the Chesapeake and Ohio and the Norfolk and Western Companies, and has unified competing interests to an extent surpassing anything done by any other company in that direction. And by its stock ownership of the Baltimore & Ohio, with its "Royal Blue" competitor of the Pennsylvania line between New York and Washington, and of the other lines, it has come to pass that no officer of the U. S. Government—no member of this Court—can go by rail to or from Washington except upon one of several lines, originally competing, but now either owned or leased by the Pennsylvania, or operated by a company in which the Pennsylvania owns a majority of the stock.

A reference to the extracts from Poor and the Interstate Commerce Reports will show other instances, but these are enough.

It would, however, be invidious to pass over two

instances, one directly connected with this case, the other furnished us by the Government's evidence in this case.

In May, 1901, the Oregon Short Line purchased a majority of the stock of a competing railroad—the Northern Pacific—held it till November, 1901, when its majority was about departing from it, and then disposed of it. It was the acquisition of this stock —this "raid" on Northern Pacific—that brought on the panic of May 9, 1901.

By the testimony of Mr. Harriman, given before the Interstate Commerce Commission in January, 1901, in an investigation of "Consolidations and Combinations of Carriers * * * including the Community of Interest Plan," and which testimony was introduced in evidence by the Government in this suit (I, 598 et seq), it appears that the Union Pacific Ry. Co., besides owning all the stock of the Oregon Short Line, and, jointly with the Short Line, all the stock of the Oregon Railway and Navigation Co., owns also $75,000,000 of the stock of the Southern Pacific Co. (I, 608), and its voice usually controls the action of the latter's directors (I, 605). One man, Mr. Stubs, traffic manager of the Union Pacific, can make the rates on the Southern Pacific and the other lines (I, 650).

In effecting these and other like combinations hundreds of millions of corporate stocks and securities have been created and issued, and are now held by hundreds of thousands of persons in every walk of life. These holders bought them, sharing the general belief in the lawfulness of the transac-

tions in which they were issued, and the validity of the State legislation by which they were authorized.

All these stocks and securities were, however, (like those issued in the combinations effected before the Anti-trust Act) illegal in their inception, and are utterly void, if the transactions in or in aid of which they were issued were combinations in *direct* restraint of interstate commerce, and so prohibited by the Anti-trust Act.

2. These various transactions were not done in a corner. They were had openly, one after another, during all the years that have followed the Anti-trust law. They were reported and commented upon in all the principal newspapers; appeared year after year in Poor's Manual, the history and terms of each transaction being repeated in each subsequent year; were included in the annual reports of the companies to the Interstate Commerce Commission, copies of which were requested of the Commission by the defendants and were by the Commission refused; were reported year after year in an abridged and condensed form by the Commission to Congress. They were known to every department of the Government.

The Oregon Short line purchase and the crash of May 9, 1901, which followed it, were as widely advertised and as well known as almost any event that has occurred in this country.

And their lawfulness was universally acquiesced in. The duty of restraining all violations of the Anti-trust act is laid by the act in express terms

upon the Attorney General, but not one suit has been instituted in any of these cases. There can have been but one reason for this. The present incumbent of that office and his predecessors are not to be charged with neglect of sworn and plain duty in their abstention from prosecuting. They abstained, one and all, because in their judgment the act had no application; because, in their judgment, such combinations, whether formed before or after the act, were not combinations in *direct* restraint of interstate commerce, did not act *directly* upon it. Had the present Attorney General thought otherwise he could not have failed to prosecute in the Oregon Short Line Case. It is not to be imagined that even now, the Attorney General, if he considered such combinations to be infractions of the law, would shut his eyes to those doing business at the very capitol of the nation, at the city of his own residence, between the greatest cities of the country, everywhere east of the Mississippi River, should turn his back on them, and go half way across the continent in search of a violation of the act.

The judgment of the Attorney General and his predecessors, that none of the consolidations, purchases, leases, etc., that have been mentioned are within the act, is clearly right.

But if they are not within the act, the Securities Co. certainly is not. And if the act can be held to apply to the Securities Co., it applies far more directly to each and every of the companies that have been mentioned, and the Government's failure to prosecute them is without excuse.

3. The petition says (I, 8 a, par. VI):

> "By making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to-wit: the holding corporation, with not only the power, but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

Premising that the only stockholder of each system that is interested in both (except such holders of stock in each as have not come into the Securities Co.) is the Securities Co., we ask, what is there in this statement as to the Securities Co. and its shareholders, and the effect of the Securities Co. holding a majority of stock of both railway companies, which is not equally true of the New York and New Haven Co. and its stockholders, and the effect of its shareholding in other companies?

Or which is not true of the New York Central and its shareholders, and the effect of its holding directly nearly all the shares of the Lake Shore and of the Michigan Central, and, indirectly, nearly all the shares of the Nickel Plate?

Or which is not true of the Reading Co. and its shareholders, and the effect of its holding of *all* the stock of the Reading R. Co., and more than a major-

ity of the stock of the Central R. Co. of New Jersey?

Or which is not true of the Penn. R. Co. and its purchases of shares in the Baltimore and Ohio, the Chesapeake and Ohio and Norfolk & Western, companies competing with it as well as with each other?

But the things alleged in this passage do not make a violation of the Anti-trust law when done by any of these companies. How do they violate it when done by the Securities Co.?

In paragraph VIII (I, 10 a), it is said that the Securities Co.:

> "Is now holding, as owner and proprietor, substantially all of the capital stock of the Northern Pacific Railway Company, and, as complainant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein, and is voting the same, and is collecting the dividends thereon, and in all respects is acting as the owner thereof in the organization, management, and operation of said railway companies, and in the receipt and control of their earnings, and will continue to do so, unless restrained by the order of this court. By reason whereof, a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway Systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several States, and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce, to the great and irreparable damage of the people of the United

States, in derogation of their common rights, and in violation of the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies."

What is there in any of these things charged against the Securities Co. which is not equally true of the companies just mentioned in respect of their holdings of stock in companies theretofore competing?

But each and every of these things when done by either of the companies just mentioned are innocent of any violation of the Anti-trust Act. How then can it be that when done by the Securities Co., they are "in violation of the Act of Congress," etc., as charged in the foregoing passage?

In Paragraph XII (I, 13 a), it is said:

"If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and Great Northern Railway Companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be effected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies,"

> may be circumvented and set at naught, and all trans-continental lines, indeed, the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation."

Aside from the expressed foreboding lest the Securities Co. absorb all the railways of the country, what is there in this passage which is not as true of each of the railway companies just mentioned as of the Securities Co., but which is wholly innocent in the case of those companies? Why are they any less innocent in the case of the Securities Co.?

As to the foreboding: What means has the Securities Co. of absorbing the entire railway system of the country which is not possessed by the New York Central, the Pennsylvania, or any powerful system? It may be said that these companies are not authorized by their charters to make unlimited purchases. Judging from what they have done and are doing, this would not seem to be true. But the whole matter of purchase and sale of railways and railway shares is in the hands of the states chartering the companies. If they deem it wise policy (and of this they and not Congress are sole judges), why may they not prohibit any person or company from hereafter acquiring shares in each of two competing companies, just as many of them forbid a railway company from holding stock in a competing company?

4. The Securities Co. is a mere shareholder in two competing lines. It *directly* controls the commerce of neither. The Pennsylvania Co. in its majority holding of Panhandle stock, controls that line as much as the Securities Co. can control the line of either defendant railway company. As lessee of the Fort Wayne it *directly* and absolutely controls that line, and it also holds a majority of its stock.

The Boston and Maine, by its own board of directors, *directly* and absolutely controlled the Eastern of Mass. and its leased lines until recently, when it absorbed them, issuing its stock in place of theirs (seemingly as reprehensible an act as the exchange made by the Securities Co.) and now directly operates them as its own.

The New York & New Haven seems to have a settled policy for leasing competing lines, and then absorbing them by replacing their shares by its own—notably in the case of the New England Co. Here, too, one board of directors directly operates several competing lines.

Under the New York Central's lease of the West Shore, its board of directors directly operates both roads.

Every one of these cases of absorption or lease of a competing line, with the result that a single board of directors directly operates both lines and makes rates for both, is far more obnoxious than the Securities Co. to the charges which it has pleased the Government to bring against that company. Yet in none of these cases is there any direct re-

straint of commerce, even if there is any restraint at all.

But if it is not a *direct* restraint of commerce or suppression of competition for one railway company to operate by its own board of directors both its own and a competing line, how can it *directly* restrain commerce for the Securities Co. to hold a majority of stock in two competing lines, neither of which it operates, and each of which is and must be operated by its own separate and independent board of directors?

5. It has been intimated that the fault of the Securities Co—a fault not shared by the companies that have been reviewed—is that it was formed for the purpose of taking over the shares of the two railway companies, and hence the Securities Co. is guilty while the Reading Co. and others are innocent. That if, instead of forming a new company, the promoters had got hold of an old charter as was done in the Reading case, and the company thus chartered had done just what the Reading Co., the N. Y. Central, and the Securities Co. have done, there would have been no cause for complaint.

And so, if instead of the Northern Pacific and Great Northern buying the Burlington shares, the Burlington had bought theirs, the combination would have been unobjectionable.

And that this difference explains the Attorney General's selection of the Securities Co. as a subject

of prosecution to the exclusion of any of the other companies mentioned.

To all this there are several answers.

(1) The Act proscribes *every* combination in direct restraint of trade, and does not distinguish between combinations. Whether the holding of shares by one company in two others in itself restrains commerce in no way depends on the origin of the former company.

(2) It makes no distinction between corporations—none between hunting up an old charter to use as a means of restraining trade and forming a new one for that purpose.

(3) If it was a conspiracy in restraint of commerce for the promoters of the Securities Co. to form and carry out a plan to have the shares in the Great Northern and Northern Pacific purchased and held by the Securities Co., why was it not equally a conspiracy for the individuals composing the board of directors of the New York Central (or the whole body of stockholders, if they took action) to form and carry out a plan by which the shares in the Lake Shore, Nickel Plate and Michigan Central should be bought and held by the New York Central Co.?

Or for the promoters of the Reading Co. to combine to hunt up and acquire an old charter of a holding company, and have the shares of the Phila. & Reading R. Co. and the Central R. Co. of New Jersey, transferred to it?

What possible difference can it make in law whether in either case the purchasing company pays for the shares bought in its bonds (as was done by the New York Central) or in its own shares, as has been done over and over again by the Boston & Maine and the New York and New Haven and other companies?

6. Every difference between the Securities Co. and any of the railway companies mentioned is in favor of the Securities Co. And one great—in some respects the most important—difference remains to be mentioned. Those companies' lines are all in the East, in a fully-developed country. They combined to unite in one control an existing business. The Great Northern and Northern Pacific, fully as much as other far western lines, have had to create, and still have to create, the business by which they must live. They combined in the purchase of the Burlington, not to unite in one control an existing business, but to enlarge existing and create a far greater traffic. And their shareholders have combined to protect this enterprise. And yet the Government would have it that the Eastern combinations are wholly laudable, while this is wholly base and bodes ruin to the entire country.

EIGHTH.

Even though the Government were entitled to any injunction the decree goes far beyond what the Government was entitled to receive, or the Circuit Court authorized to grant.

The only authority for the Attorney General to bring this proceeding or for the Circuit Court to entertain it, or for the one to ask or the other to grant any decree whatever is found in the fourth section of the act (supra, p. 132), which clothes the Circuit Court with jurisdiction "to prevent and restrain violations of this act," and requires "proceedings in equity" to be brought under direction of the Attorney General, "to prevent and restrain such violations;" and "such proceedings may be by way of petition, setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited."

The Circuit Court, in its decree, adjudges and decrees as follows:

1. The defendants entered into a combination or conspiracy in restraint of interstate commerce, denounced as illegal by the Anti-trust Act.

2. All the stock of either railway company claimed to be owned or held by the Securities Co. was acquired and is now held in virtue of such combination or conspiracy.

3. The Securities Co., its officers, etc., are enjoined,

(a) From acquiring or attempting to acquire any more of the railway shares.

(b) From voting any such shares.

(c) From controlling or attempting to control, etc., the corporate acts of either railway company by virtue of its stockholding.

4. The railway companies, their officers, etc., are enjoined—

(a) From permitting the stock held by the Securities Co. to be voted by it.

(b) From paying any dividends to the Securities Co. on account of such stock.

(c) From permitting the Securities Co., or its officers, etc., to exercise any control whatever over the corporate acts of either railway company.

In its petition (I, 14 a) the Government asks that the Securities Co. be required by mandatory injunction to recall and cancel all certificates of stock issued by it in purchase of or exchange for shares of the defendant railway companies, surrendering in return therefor the certificates of railway stock in exchange for which they were issued.

The Circuit Court was not authorized by anything in the Anti-trust law (its sole source of authority) to take away the property of the Securities Co. and give it to other people, or to compel the company to sell that property to, or exchange it with, other people. And if the Court had any such authority, the absence of the 1300 shareholders of the Securi-

ties Co. holding a majority of its shares for which the railway shares were to be exchanged, would be an insurmountable obstacle to the exercise of it.

The decree, however, whether that were its aim or not, succeeds in forcing the Securities Co. to do the very thing which it could not compel the company to do by mandatory injunction.

The Securities Co. is the absolute owner of the shares held by it. The decision itself says as much (II, 1705). But the decree divests it, if not of the naked ownership, yet of every use and every profit and every incident of ownership. It may not vote the stock, nor exercise any of the powers or rights of ownership, nor receive dividends, nor dispose of the shares except as permitted in the decree. There is no difference in law between stripping one's property of everything that gives it utility or value and depriving one of the property altogether. It is true there is a permission, if not an invitation, to the Securities Co. (an invitation of the royal kind, with all these injunctions in case of non-acceptance) to turn back its railway shares to their former owners in exchange for its own shares held by them—but not for cash; the Securities Co. may not sell the railway shares to others.

And all this under an authority to prevent and restrain violations of the act—i. e., to prevent and restrain combining and conspiracy to restrain commerce, and to prevent and restrain monopolizing commerce, or attempting or conspiring to monopolize it. The injunctions are against a single person, the Securities Co. The finding of fact in the

decree does not state that the company is combining and conspiring or monopolizing, but only that at some time in the past it did enter into a combination or conspiracy and thereby got its shares. So far as appears there is no conspirator but the Securities Co., which can neither combine nor conspire with itself. The injunctions against exercising its ownership of the stock, by voting, etc., have no relation to any combining or conspiracy to restrain commerce. The company is not enjoined from conspiring or from carrying out any conspiracy, or even, by a narrower injunction, from using its shares in furtherance of a conspiracy or combination. It is enjoined from every use and benefit of its property, and is enjoined *not as conspirator, but as owner*. And see page 153, *supra*.

The injunction against receiving dividends (or, what is the same thing, against the railway companies to restrain payment of them) is even less justifiable. What possible restraint of commerce can be found in the payment by each of the two railway companies to its principal shareholder of the dividends on the latter's shares? How does the holding-up of these dividends (amounting in the aggregate to about $16,000,000 per year) relieve interstate commerce from restraint?

Of course, it is a most powerful reinforcement to the invitation to the Securities Co. and its shareholders to re-exchange their railway and investment shares; but the court can hardly be supposed to have intended to decree the injunction for any such purpose, as certainly it had no power to do so.

Other patent objections to the decree, among them that it turns over the control of the Northern Pacific Co. to directors chosen by the holders of two per cent of the stock (if so small a percentage could, under its charter and by-laws, take action at a corporate meeting), and of the Great Northern to a board chosen by the holders of 24 per cent need not be particularized.

The whole decree seems to go on the theory, already refuted, that whereas the individual defendants combined to form the Securities Co. and help it get a majority of the railway shares, and the Securities Co. was formed and got the shares, and so the work of the combination and the combination itself came to an end, yet, because (as the court says) the Securities Co., when born, was born into the combination as a member of it, and although it has survived that defunct combination, it is now a combination by itself, having the power to restrain commerce, and therefore to be deemed a restrainer of it, and to be stripped of everything but its corporate existence.

The decree appealed from should be reversed, and the cause remanded with directions to dismiss the petition and proceeding.

GEO. B. YOUNG,
Of Counsel for Northern Securities Co. and others, Appellants.

APPENDIX.

Laws, New Jersey, 1867, Chapter LXIX.

"An act to validate and confirm certain agreements between the Companies owning the railroad lines between New York and Philadelphia.

"Whereas, it is desirable that the Railroad lines between New York and Philadelphia, forming by their connection essentially one line, should be more closely united in interest and management, whereby great advantages would accrue to the public as well as to the stockholders; and whereas, the Delaware and Raritan Canal Company, and Camden and Amboy Railroad and Transportation Company, known as the joint companies, owners of one portion of said lines, and the New Jersey Railroad and Transportation Company owners of another portion thereof, have made or are about making an agreement for a consolidation of interests and an equality of dividends, therefore:

"1. Be it enacted, by the Senate and General Assembly of the State of New Jersey, That the said companies be and they are hereby authorized to make such agreement for consolidation of interests, as they may deem proper and expedient; and that any such agreement or agreements heretofore made or hereafter to be made for the purposes aforesaid, by and between the said companies or by and between them or any of them, and the Philadelphia and Trenton Railroad Company, be and the same are hereby validated, ratified and confirmed; * *

"2. And be it enacted. That when such agreement for consolidation is or shall be made, the said companies entering or having entered into the same shall be consolidated and united in interest according to the terms of such agreement or agreements, and shall be authorized to transact, manage and conduct the business, property and affairs of the said companies respectively as a joint concern, and by a joint board of directors, to be composed of the directors of the said several companies, a majority of which joint board shall form a quorum for the transaction of business; but the organization and election of directors of the several companies shall remain distinct, and the provisions of their respective charters, with all the restrictions and liabilities therein contained, except as necessarily modified by such consolidation, shall continue in force. * * *

"Approved February 27, 1867."

Private Laws, New Jersey, 1887, c. 50.

"An act granting the consent of the legislature to the leasing of the railroad and franchises of the West Shore railroad company to the New York Central and Hudson River Railroad Company.

"Whereas, The West Shore railroad company has submitted to the legislature of this state for its consideration the lease of the said road and its franchises to the New York Central and Hudson River railroad company, dated December the fifth

one thousand eight hundred and eighty-five, a copy of which lease was filed in the office of the secretary of state on the fifth day of January, one thousand eight hundred and eighty-seven; now therefore

"1. Be it Enacted by the Senate and General Assembly of the State of New Jersey, That the said lease is hereby approved and the consent of the legislature of this state is hereby given to the leasing of the road and franchises of the West Shore railroad company to the New York Central and Hudson River railroad company, upon the terms set forth in said lease submitted and filed as stated in the preamble of this act.

"2. And be is enacted, That * * * this act shall be subject to alteration, amendment or repeal at the will of the legislature.

"3. And be it enacted that this act shall take effect immediately.

"Approved March 29, 1887."

Laws Mass., 1880, c. 205, p. 157.

"An Act in relation to the Leasing of Railroads.

"Be it enacted, etc., as follows:

"Section 1. The roads of two railroads shall be deemed to enter upon each other, connect or intersect within the meaning of section 170 of chapter 372 of the acts of the year 1874, if one of such roads enters upon, connects with, or intersects a road

leased to the other railroad, or operated by it under a contract as authorized by said section. But the Eastern Railroad Company and the Boston and Maine Railroad may make with each other such contract or lease for the operation of their roads for such period of time as the directors of said companies may agree to, and as shall be approved by a majority in interest of the stockholders of each company at meetings called for that purpose; provided, that the facilities for travel and business on either of the roads of the said companies shall not be diminished; and provided further, that the income arising from such contract or lease shall be subject to the provisions of law in regard to the right of the state to purchase the said roads, or reduce their tolls in the same manner as that arising from the use of the roads.

"Section 2. No railroad corporation shall lease or contract for the operation of its road for a period of more than 99 years without the consent of the legislature; provided, that this act shall not apply to any corporation whose stockholders have already acted or voted upon a lease.

"Section 3. This act shall take effect on the first day of July next.

"Approved April 21, 1880."

Laws Mass., 1888, c. 250, p. 201.

"An act to authorize the Boston and Maine Railroad to purchase the franchises and property of

the Eastern Railroad Company, and the Eastern railroad in New Hampshire, and the Portsmouth, Great Falls and Conway railroad.

"Be it enacted, etc., as follows:

"Section 1. The Boston and Maine Railroad is hereby authorized to acquire by purchase the road, franchises and property of the Eastern Railroad Company, on such terms as may be agreed to by the respective boards of directors of said corporations and as shall be approved, at meetings called for the purpose, by the votes of a majority in interest of the stockholders of said Boston and Maine Railroad, and by the votes of a majority in interest of the holders of the preferred stock, and of a majority in interest of the holders of the common stock of said Eastern Railroad Company, and by the board of railroad commissioners. After such acquisition and purchase from said Eastern Railroad Company, said Boston and Maine Railroad is authorized to acquire by purchase the road, franchises and property of the Eastern Railroad in New Hampshire, and of the Portsmouth, Great Falls and Conway Railroad, on such terms as may be agreed to by the respective boards of directors of the purchasing and selling corporation, and as shall be approved, at meetings called for the purpose, by the votes of a majority in interest of the stockholders of the purchasing corporation, and by the board of railroad commissioners, and by the votes of a majority in interest of the stockholders, other than said Bos-

ton and Maine Railroad, of the selling corporation. For the purpose of facilitating said purchases * * * the said Boston and Maine Railroad may increase and issue its capital stock to such amount and in such manner as may be required by such agreement or agreements, and as the board of railroad commissioners may determine to be necessary and expedient to carry into effect the provisions of this act. * * *

"Approved April 19, 1888."

Laws New Hampshire, 1889, c. 5.

"An Act amending chapter 100 of the laws of 1883, and authorizing certain railroad corporations to form corporate unions and to make contracts of lease.

* * * * *

"Section 10. The Boston and Maine Railroad is hereby authorized to acquire by purchase the road, franchises and property of the Eastern Railroad Company, and thereafter to acquire by purchase the roads, franchises and property of the Eastern Railroad in New Hampshire, the Portsmouth, Great Falls & Conway Railroad, the Portland, Saco & Portsmouth Railroad Company, the Wolfeborough Railroad, the Portsmouth & Dover Railroad, the Worcester, Nashua & Rochester Railroad Company, the Manchester & Lawrence Railroad, the West Amesbury Branch Railroad Company, the Dover & Winnipiseogee Railroad, and the Portland

& Rochester; * * * all on such terms and conditions as may be agreed upon by the board of directors of the purchasing corporation and the board of directors of the selling corporations respectively, and shall be approved by the votes of two-thirds of the stock of the purchasing corporation, and by the votes of two-thirds of the stock of the selling corporations respectively. * * *

"For the purpose of facilitating said purchases and to carry into effect the agreement or agreements made as hereinbefore authorized, the said purchasing corporations may purchase the stocks, bonds, and other obligations or any part thereof of any of said selling corporations; * * * may change their stock, bonds, or notes for the stock, bonds, property, rights and franchises of any of said selling corporations and in payment of the obligations of any of them; * * * After each of the purchases herein authorized, said purchasing corporations shall have and enjoy all the rights, privileges, and franchises theretofore had and enjoyed by the selling corporations, and be subject to all their duties, debts and liabilities.

"Approved July 24, 1889."

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